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MASSACHUSETTS LAWYERS' INSTITUTE and CONVENTION
NEW OCEAN HOUSE, SWAMPSCOTT, JUNE 25-26, 1954

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Volume XXXIX JUNE, 1954 NUMBER 2

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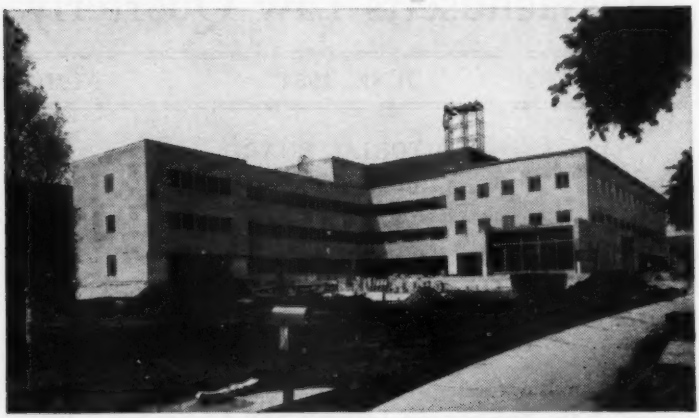

THE AMERICAN BAR CENTER BUILDING
As of June 2, 1954

THE AMERICAN BAR CENTER NEARS COMPLETION

ALAN H. W. HIGGINS
Chairman Executive Committee of American Bar Foundation

The American Bar Foundation has raised 89 per cent of its $1,500,000 building fund to finance the American Bar Center in Chicago but Massachusetts has collected only 59 per cent of the state quota of $48,000.00 for the drive. The campaign among lawyers is organized in every state and territory of the United States. The building will be completed in July and dedicated August 19 by Chief Justice Earl Warren. When completed the center will gather all the bar committee reports and other bar association literature throughout the country and make it available for ready reference by correspondence or otherwise. Charles B. Bugg of Boston is the Massachusetts director, while local drives are being conducted by Ralph G. Boyd in Boston; Ray C. Wingate in Fall River; Morris R. Brownell in New Bedford; Ralph C. Jandreau in Springfield; and Bradley B. Gilman in Worcester.

Give what you can. Even small contributions will be welcomed.

MASSACHUSETTS BAR ASSOCIATION

Announces the

THIRTEENTH MASSACHUSETTS LAWYERS' INSTITUTE AND CONVENTION

at the

New Ocean House, Swampscott

PROGRAM

FRIDAY, JUNE TWENTY-FIFTH

11:00 a.m. ROGER J. DONAHUE, Esq., *Presiding*

New Statutes and Recent Decisions . Ball Room

Discussion by Alan J. Dimond, Esq. and Haven Parker, Esq. of the Boston bar.

12:00 M. Outdoor Barbecue Luncheon as guests of the Association.

1:30 p.m. HONORABLE EDMUND R. DEWING, *Presiding*

Equity Procedure . . . . . Ball Room

A general discussion of equity pleading and practice by Leo A. Reed, Esq., a well-known writer on "Equity".

3:00 p.m. GUY NEWHALL, Esq., *Presiding*

Probate Problems . . . . . Ball Room

A panel discussion of probate matters, including important recent decisions and statutes, adoption and divorce, marital deductions in wills, change in the rule against perpetuities, by Honorable F. Anthony Hanlon, Judge of Berkshire County Probate Court; Honorable Frederick V. McMenimen, a judge of Middlesex County Probate Court; Professor W. Barton Leach; Attorneys Paul B. Sargent and Ines DePersio of Boston.

3:30 p.m. Gypsy Tea for the Ladies . . Main Foyer

5:30 p.m. Cocktail hour

6:30 p.m. Dinner

8:30 p.m. RAYMOND F. BARRETT, Esq., *Presiding*

"Bar Relief"—Novel entertainment by and about lawyers.

10:30 p.m. Dancing

SATURDAY, JUNE TWENTY-SIXTH

10:00 a.m. JOSEPH SCHNEIDER, Esq., *Presiding*
Superior and District Courts . . Ball Room
Current problems—congestion, pre-trial, full time judges. Discussion by Superior Court judge, Honorable Eugene A. Hudson; Chief Justice of the Municipal Court of Boston, Honorable Elijah Adlow; Honorable Edward Morley, Justice of District Court of Eastern Essex; A. Clinton Kellogg, Esq., Asst. Clerk of Courts in Norfolk County; Andrew G. Geishecker, Esq., Clerk of District Court at Dedham, and Attorneys Lincoln S. Cain of Pittsfield, Gerald P. Walsh of New Bedford and Stanley B. Milton of Worcester.

10:00 a.m. North Shore Tour for the Ladies
Visit to historic points in Marblehead and Salem.

12:00 m. Luncheon and Annual Meeting of the Junior Bar Conference of the Massachusetts Bar Association.

1:00 p.m. Luncheon

2:30 p.m. Forty-Third Annual Meeting of the Massachusetts Bar Association . . . . Ball Room
Report of the President Robert W. Bodfish
Reports of the Treasurer and Committees.
Report of Nominating Committee, Richard Wait, Chairman.

3:30 p.m. Special Ladies' Entertainment Priscilla Room

5:30 p.m. Cocktail hour

7:00 p.m. INSTITUTE DINNER
Presiding Officer: Robert W. Bodfish, President of the Massachusetts Bar Association.
Remarks by Honorable Stanley E. Qua, Chief Justice of the Supreme Judicial Court.
Guest Speaker: Honorable David W. Peck, Presiding Justice of the Appellate Division of the New York Supreme Court, First Department.

10:00 p.m. Dancing

NOTICE OF THE 43rd ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION

The 43rd Annual Meeting of the Massachusetts Bar Association will be held at the New Ocean House, Swampscott, on Saturday, June 26, 1954, at 2:30 p.m. in connection with the Massachusetts Lawyers' Institute and Convention for the election of officers for the ensuing year, the consideration of reports and such other business as may come before the meeting.

In accordance with the by-laws, the report of the Nominating Committee accompanies this notice.

FRANK W. GRINNELL, *Secretary*

REPORT OF NOMINATING COMMITTEE

The committee herewith submits its nominations for officers and members at large of the Board of Delegates of the Massachusetts Bar Association to fill vacancies that will exist at the annual meeting to be held on June 26, 1954.

President:	ROBERT W. BODFISH, Longmeadow
First Vice-President:	JOSEPH SCHNEIDER, Brookline
Vice-Presidents:	RAYMOND F. BARRETT, Quincy WALTER J. DONOVAN, Adams THOMAS M. A. HIGGINS, Lowell SYBIL H. HOLMES, Boston GEORGE H. MASON, Worcester
Treasurer:	EDMUND M. MURRAY, Wellesley
Secretary:	FRANK W. GRINNELL, Boston
Asst. Secretary:	WILLIAM B. SLEIGH, JR., Marblehead

Members at Large—Board of Delegates

JOSEPH T. BARTLETT, Greenfield
NATHAN B. BIDWELL, Boston
CHARLES S. BOLSTER, Cambridge
JOHN J. FOLEY, Lynn
GEORGE F. GARRITY, Abington
HAROLD HORVITZ, Newton
GERALD P. WALSH, New Bedford

Respectfully submitted,

FLETCHER CLARK, JR. — JACOB J. KAPLAN
JAMES A. CROTTY — MAURICE J. LEVY
JAMES E. FARLEY — RICHARD WAIT, *Chairman*

BLIND PLEADING AND PRACTICE—A CAUSE OF DELAY AND CONGESTION

For half a century and particularly for the past twenty-five years, lawyers and their clients, judges, legislators and others have been complaining of congestion and delay in the courts and especially in the Superior Court. Pages and pages of continuous preaching about the professional obligation of the bench and bar and legislatures to do something have appeared and still appear continuously. But the practice of the bench and the bar and the legislature has been so inconsistent with the preachments as to be ludicrous if it were not so serious. It reminds us of the remarks of a lecturer on reform some years ago who after telling students that the profession wanted to reduce delay, added "but don't forget that most lawyers want delay when they want it, if they can get it." He might have added that they are very ingenious about getting it. The common suggestion is to appoint more expensive judges to work under the same old rules but don't change the rules, however much they may cause delay. Almost all the suggestions for changing the rules, either by court or by legislation have been rejected or ignored.*

The reason for this discussion is a very recent letter received from a competent and thoughtful practitioner in western Massachusetts.

"In a case I recently brought . . . I filed written requests for admission of facts; included therein was a request that the defendant admit that he lived on a certain street and had an office in Boston on a certain street. Other requests were of like nature. I was greatly surprised to receive, almost by return mail, a statement signed by the defendant, under oath, denying each and every item.

"I checked with a prominent Boston attorney who said that certain attorneys have adopted this method of denying everything.

"I thought you would be interested in how statutes such as this, G.L. 231, Sec. 69, aimed to simplify issues and get matters heard expeditiously, can be mutilated and destroyed in practice.

"It seems to me that when a defendant denies under oath that he has an office at Boston, etc., that we ought to be able to bring him in for perjury. It almost seems that the court would take some action in the premises."

The Practice Act of 1851 (still the substantial basis of Massachusetts practice) resulted from the report of a distinguished Commission consisting of Benjamin R. Curtis (shortly after appointed to the Supreme Court of the United States), Reuben A. Chapman, later Chief Justice of the Supreme Judicial Court and Nathaniel J.

*Compare Dimond's article on the subject since 1859, in "Quarterly" for June 1953.

Lord, a leader of the Essex bar.* The Commission described the practice then existing as follows:—

"Both parties coming to the trial with no certain knowledge of the points of the case, or the course which the trial is to take, each must feel his way as he goes; the court and jury must do the same, and it often happens that it is not till the concluding arguments of the counsel are made, that the jury can get any clear idea of what is to be tried by them; the case on neither side having been opened, because neither side knew what the case was. The immediate effects are, very dilatory conduct of the trial, and the consumption of much time in beating over ground, which is found, at last, to lie quite outside of the case. The remote effects are, to induce a loose habit of preparation for the trial, to compel the court to rule on questions without any general view of the case, and to find out the matters to be tried often near the close of the trial; to cause a *nisi prius* trial to be a kind of preliminary enquiry to get the case into shape, instead of a trial of it; . . ."

They then stated the purpose of civil pleading;

"1st. That each party may be under the most effectual influences, which the nature of the case admits of, so far as he admits or denies anything, to tell the truth. 2d. That each party may have notice of what is to be tried, so that he may come prepared with the necessary proof, and may save the expense and trouble of what is not necessary. 3d. That the court may know what the subject-matter of the dispute is, and what is asserted or denied concerning it, so that it may restrict the debate within just limits, and discern what rules of law are applicable. 4th. That it may ever after appear what subject-matter was then adjudicated, so that no further or other dispute should be permitted to arise concerning it."

In 1933, in its 9th report, the Judicial Council said (pp. 20-23).

"In the resolve of 1925, the legislature also requested suggestions 'for requiring parties to frame issues in advance of trial' in order to make the issues for trial more specific."

"The Judicature Commission, in its final report in 1921, said our system of pleading in civil actions at law is comparatively simple. It is based on the report of the commission of 1851. . . . The commissioners of 1851, instead of throwing over the entire scheme of common-law procedure and substituting some new code of procedure such as was tried in other states, recommended doing away with most of the technicality, and retained the simpler portion of the common-law structure.

"The main complaint which the present commission has received in regard to pleading is the lack of definiteness which permits almost

* The full report of the Commission on the Practice Act of 1851, together with the commissioners' notes to different sections and the legislative act based upon it and Mr. Hall's analysis, will be found in "Hall's Massachusetts Practice," which was published in 1851, and was entirely devoted to the study of this act.

any defence, with a few exceptions, to be raised under what is called a "general denial," which allows a defendant to deny all the allegations in a plaintiff's declaration without giving any information as to the real nature of his defence unless he happens to rely on such facts as payment or the statute of limitations or a few other things which still have to be affirmatively set up. This lack of definiteness, which results in the necessity of preparing for trial on many points which turn out to be unnecessary because they are really undisputed, is one of the most serious problems in our whole system of procedure."

"The practice of a 'general denial' of 'each and every allegation' was not contemplated by the practice act. As early as 1861, in the case of *Boston Relief & Submarine Co.* v. *Burnett, 1 Allane at p. 411,* the Supreme Judicial Court said:

'If an attorney should adopt it where he was not instructed by his client that there was sufficient grounds to contest all the averments to which it would apply, the practice would be highly censurable and inconsistent with professional duty. It would also be in the power of the court, where there could be any doubt as to the facts thus put in issue, to require, upon the plaintiff's motion, a more exact and detailed answer or to postpone the trial on the ground of surprise.'

"In spite of this emphatic comment, the practice of filing a general denial was allowed to continue until it became almost universal and produced the present unsatisfactory condition, described by the Judicature Commission, which postpones the ascertainment of the facts often for several years until the memories of witnesses have either faded or have been refreshed without special reference to the original facts.

"It is a common remark among experienced judges and lawyers that in civil cases as well as in criminal cases one of the most effective methods of avoiding unnecessary or unduly extended litigation is to get at the facts as soon as possible after the occurrence to eliminate undisputed issues and narrow the case to the real dispute, if there is any. When such opportunities are provided, it often appears that there is nothing to try.

"Following out the suggestion of the Supreme Judicial Court in the passage above quoted from *Boston Relief & Submarine Co. v. Burnett,* that 'It would be in the power of the court to require a more exact and detailed answer,' the Municipal Court of the City of Boston has . . . had a rule providing that when in contract cases the defendant enters only the answers of a general denial or general plea of payment, the plaintiff may, as of course, take from the clerk's office an order for further particulars as required by another rule requiring specific answers to each substantive fact alleged which is in good faith intended to be denied, and, in pleas of payment, a statement of the times and amounts of payment, and that on failure to comply, the court *may* default the

defendant. This rule has been widely used, and in practice appears to afford plaintiffs an effective weapon.

"In view of the success of this experiment in that court, we suggest that it might be adapted for use in the Superior Court", the District Courts have it in Rule 13.

As Mr. Black pointed out in the "QUARTERLY" for April 1952 (vol. 37, No. 1, p. 75).

"As I understand it, the virtue of common law special pleading lay in that it presented a *single* issue of fact, upon which both parties decided to rest their case. Today we have gone to the opposite extreme, and many issues may be taken for decision and deliberation into the jury room. This is leading in some states to a development of special verdicts, by interrogation by the court, when the verdict is rendered, for approval and recording by the court.

"Motions for specifications were developed as a tool for the plaintiff to smoke out a defendant who had pleaded the general issue. (See Colby, Mass. Practice 1848.) One of the main purposes of the Practice Act was to obviate the defects of the general issue, and force a defendant to set forth his true defense if any. This was somewhat nullified in 1861 by the opinion in Boston Relief and Submarine Co. v. Burnett, 1 Allen 410, which is the beginning of the 'general denial' ".

The Practice Act provided for interrogatories and since then we have had "notices to admit facts", pre-trial sessions (by rule of court) and other suggestions have been made but not followed and we are still floundering about with blind pleading and practice although the court has authority to try experiments by rule to check what the Judicature Commission (headed by the late Judge Sheldon) described as the main complaint thirty-four years ago: "lack of definitiveness under the 'general denial' ". And now we have the latest dilatory practice of using the "general denial" not only for answers but in "notices to admit facts" as explained in the letter quoted early in this discussion, thus defeating the purpose of G.L. C.231 Section 69 as amended. There may be misunderstanding about this section. It may be thought that the only penalty of a failure to admit undisputed facts is the costs of proving these facts. That was true under the section before 1946, but after the opinion in Gordon v. American Tankers Corp. 286 Mass. the Judicial council, in its Twenty-First Report, in 1945, (p. 57-58) pointed out that the section had "failed in its purpose" and recommended an amendment. The legislature redrafted the section by Chapter 450 of 1946 and inserted the requirement that "a sworn statement either denying specifically the matters of which an admission is demanded or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters".

A denial under oath of indisputable facts without facts showing reasonable grounds for refusal to admit seems a serious proceeding.

Is it not time that the court exercised its power by rule to really carry out the purpose of the Practice Act of 1951-2 and of Chapter 450 of 1946? G. L. Chap. 213 Section 3 authorizes the court to do so and the Supreme Court, in the case above cited, recognized the power. There is nothing new about this, as illustrated by the following story of Chief Justice Parsons.

"On one occasion Samuel Dexter, who was at one time in the Cabinet, who was the leader of the bar next to Parsons and engaged in many of the most difficult cases, protested at the conduct of the Chief Justice saying, 'Your Honor did not argue your own cases in the way you require us to.' 'Certainly not,' answered Parsons, 'but that was the judge's fault, not mine'." (See "Quarterly", Aug. 1953, 73-75.)

The late Chief Justice Bolster, a great administrator, was far more emphatic than anything which appears above. The following extract from his remarks may well be pondered by both bench and bar.

F. W. G.

"GENERAL DENIALS"

By CHIEF JUSTICE WILFRED BOLSTER

At a luncheon of the Boston Bar Association on February 5, 1938 Chief Justice Bolster delivered an address on the Municipal Court and practice before it (see 23 M. L. Q. No. 2, p. 1). He discussed general denials as follows:—

Extract from the Address

"When it comes to drawing an answer, my first advice to you young lawyers rather than to those already steeped in sin would be 'obey the law.' Here it is—'The answer shall deny in clear and precise terms every substantive fact intended to be denied'—and that means an honest intent, with belief that facts exist which warrant denial—'or it shall declare the defendant's ignorance of the fact so that he can neither admit nor deny but leaves the plaintiff to prove it.' The statute intends that answers shall be drawn, not in the dark, but in the light of knowledge. So do the rules of our court. How often do you see an answer that squares with the statute mandate? The general denial is almost universally used. When Judge Lummus and I drafted the small claims rules we forbade the use of the general denial, and in consequence we get much more clearly defined issues for trial. It is a pity that the supreme court, which knew the abuses of the old general issue, abolished by statute, did not exclude the general denial at the start, but here is what it said about it in

"Boston Relief & Submarine Co. vs. Burnette, 1 Allen 410 (1861).

'We can imagine that so concise and comprehensive a form of denial, if commonly adopted, might lead to abuses:—If any attorney should adopt it, where he was not instructed by his client

that there were sufficient grounds to contest all the averments to which it would apply, the practice would be highly censurable and inconsistent with professional duty.'

"See also *Mulrey vs. Mohawk Valley Ins. Co.*, 5 Gray 541. If you do the wrong thing often enough and long enough you will get to thinking you are doing the right thing, but it will still be wrong. The general denial today is mainly the resort of the man who is too lazy to find the facts or is 'stalling' for time, or puts in a general plea in the mere hope that it may sometime serve to trip his adversary. A common answer in a motor tort case is the general denial, contributory negligence, denial of agency and the short Statute of Limitations. How about this as an example of obedience to the law? 'The defendant admits that at the time and place stated in the declaration a motor vehicle owned by him and then operated by him (or, "by his agent" if such be the case) was in collision with another motor vehicle, whether that of the plaintiff is unable to admit or deny, being ignorant thereof, so he leaves the plaintiff to prove it. But he says that the collision was caused, not by his negligence, but by the negligence of the driver of the other car, being the plaintiff or his agent.' That may sound novel, but it is the sort of thing the law has called for for nearly a century. And it may be, that if the bar had lived up to the letter and spirit of the statute no pre-trial sessions in the superior court would have been found necessary. What is to be said for an attorney who, defending an action on a note, denies signature, but says his client paid it, and for good measure pleads the general denial, want of consideration, failure of consideration, alteration, illegality, duress, and anything else he can think of. Fortunately, the plea of coverture has become forgotten. This is no fanciful case. I can show you plenty of such pleas. I suppose the attorney thinks he is clever. I think he should be disbarred, or at least suspended till he promises reform. It is just such practices as these that have made the public contemptuous of our legal ways and the responsibility for this practice is on the bar.

"I wonder if the public, seeing the lawyers engaged in deception, have not been encouraged to add to it on the witness stand.

"Quite apart from obedience to the law, such pleading as I have described is bad policy. The legislature cannot change human nature by saying that pleadings are not evidence, and I venture the suggestion that the cockles of the judicial heart warm less to one who puts in such a specious plea than to one who admits all indisputable allegations and bares his real defence. I don't think I am the only judge who starts to hear a tort case with a bad taste in his mouth if the defendant has pleaded the Statute of Limitations knowing that the accident happened two weeks before suit or has denied agency knowing full well that no such defence exists. Many counsel think they have purged the original sin by saying that a particular defence is waived. I don't agree with them."

A SERIOUS CHANGE IN THE METHOD OF REVIEW IN CRIMINAL CASES

By WILLIAM S. KENNEY

In 1925 (Chapter 279) a speedy method of carrying questions to the full court upon an indictment for murder or manslaughter was established.[1] The review was on a typewritten transcript of the evidence, claim of appeal, summary of the record, and assignment of errors by defendant. A Bill of Exceptions as a mode of review of questions arising in such trials was abolished.

The Judicial Council 2nd Report p. 81 (XII M.L.Q. (2) 81) recommended that the review provided by this act of 1925 be restricted to murder cases and such manslaughter cases as presiding judge might direct.

The Legislature in 1926 (Chap. 329) extended the act of 1925 to include murder, manslaughter, and any other felony case which a justice of the superior court might make subject to the act.

The provisions concerning review on typewritten transcript are now found in G.L. (Ter. Ed.) Chap. 278 sec. 33A-33G. See also Chap. 278 sec. 31 which provides that no bill of exceptions permitted in cases subject to 33A-33G.

Chap. 187 of 1954, effective Sept. 1, 1954, enlarges the scope of sections 33A-33G to include all felony cases and misdemeanor cases tried with a felony.

The new amendment will insure that a stenographer takes the evidence in all felony cases and misdemeanor cases tried with a felony in the suprior court. That there should be available a transcript of evidence in all serious cases has long been sought by those interested in the improvement of the administration of criminal justice.[2]

However, it is doubtful whether this goal should have been accomplished by making all felony cases and misdemeanors tried with a felony subject to sections 33A-33G. It would seem that to require the supreme judicial court to review all felony cases and misdemeanor cases tried with a felony upon a typewritten transcript of the evidence is to place an unnecessarily heavy burden upon that court.[3] And to require a defendant to pay for a transcript of the whole evidence when all evidence material to deciding a question of law could be stated clearly and concisely in a bill of exceptions would seem to be unduly burdensome.

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1. See "The Speed of Criminal Appeals", XXI MLQ (6) p. 29.

2. See recommendation of the Judicial Council 27th Report, pgs. 28-29.

3. See Second and Final Report of the Judicature Commission, p. 68-70 where methods of presenting cases to the Full Bench were considered.

Another effect of Chap. 187 is that a writ of error in felony cases or misdemeanor cases tried with a felony shall not issue as a matter of course but only after allowance by a justice of the supreme judicial court after notice to the attorney general or other attorney for the commonwealth. G.L. (Ter. Ed.) Chap. 250 sec. 11.

Would it not have been better to have provided for a stenographer in all serious cases without making all such cases subject to sections 33A-33G, and leave to the discretion of the trial judge whether or not a particular felony case and a misdemeanor tried with such felony should be subject to 33A-33G.?

CHAPTER 187

AN ACT RELATIVE TO THE TRANSCRIPTS OF EVIDENCE AND THE FILING OF APPEALS IN CERTAIN CRIMINAL CASES.

SECTION 1. Chapter 278 of the General Laws is hereby amended by striking out sections 33A and 33B, as appearing in the Tercentenary Edition, and inserting in place thereof the two following sections:—*Section 33A.* In any proceedings or trial upon an indictment or complaint *for any felony and for any misdemeanor tried with a felony,* the evidence shall be taken by an official stenographer or by a stenographer appointed by the court, and transcribed in such number of copies as the court may direct, *one copy to be furnished to a defendant who has filed a claim of appeal under the provisions of section thirty-threeB.* The evidence transcribed shall be designated as the "Transcript of the Evidence", shall be certified by the stenographer and shall, with such corrections as are made therein by direction of the court, be regarded as a true record of the evidence. Alleged errors in the transcript of the evidence must be seasonably called to the attention of the court. Exceptions taken during the proceedings and trial shall be numbered consecutively in the transcript of the evidence. *The defendant shall pay for the expense of his transcript unless the court otherwise directs.*

Section 33B. A defendant in a a case *of any felony, and misdemeanor tried with a felony,* aggrieved by an opinion, ruling, direction or judgment of the superior court, rendered upon any question of law arising out of such case *or upon any interlocutory ruling* or a motion for a new trial, but not upon a plea in abatement, who desires to appeal therefrom and whose exceptions thereto have been seasonably saved shall, within twenty days after verdict, file a claim of appeal in writing with the clerk, who shall forthwith notify the district attorney of such claim.

SECTION 2. *This act shall take effect on September first in the current year.* *Approved March 8, 1954.*

A MISTAKEN VIEW OF ARTICLE VIII OF THE MASSACHUSETTS BILL OF RIGHTS

On May 13th, the day after the joint convention of the legislature which gave the first approval of the amendment to extend the term of a governor from two to four years, the following statement appeared in Mr. W. E. Mullin's article in the Boston Herald.

"One of the offshoots of yesterday's convention of the Legislature was the surprise revealed by some of the members when their attention was called to the forgotten constitutional provision for the recall of any elected official from the Governor down. For the most part the legislators were unaware of this obscure article.

"Years ago Boston had a provision in its charter giving the voters the right to end the tenure of their Mayor halfway through his term.

"There is no statutory law making provision for the recall of a governor or a state treasurer, but there is ample means to exercise such a drastic move provided the Legislature goes to the trouble of enacting a law. The discussion came about as the result of a demand that a recall provision be included in the proposed constitutional amendment to extend the tenure of the governor and the other constitutional offices from two to four years.

"The recall provision is contained in Article VIII of the first part of the state constitution. Its text is: In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.

"Thus, only a simple enactment would be required to implement this clear-cut provision for the recall of any public official. The rollcall vote on the Graham amendment was evidence that such a law could be readily passed in normal circumstances.

"If the constitution is finally amended to extend the tenures of these six constitutional offices to four years, there will no doubt be a demand for a recall law. In a legislative session only a majority vote would be required in each branch. To attach the Graham amendment yesterday a two-thirds vote would have been required."

If, as suggested, this view of Article VIII is held by members of the legislature and others, it may if not corrected lead to unnecessary time-consuming discussions in the State House. In order to avoid that so far as possible we respectfully submit that this interpretation of Article VIII is mistaken. That article reads:

"Art. VIII. In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by *their*

frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments."

The words "as they shall establish *by their frame of government*" are controlling. It may be forgotten that our Constitution consists of two parts as follows:

"Part The First"

"A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts."

This Bill of Rights contains 30 Articles including Article VIII above quoted.

"Part the Second"

"The Frame of Government."

This Second part is specifically referred to in Article VIII of the "First Part" as "the frame of government" and it contains no provision for the recall of state officers. Recall provisions in Municipal Charters are quite different, for such charters are statutory so that the legislature can make provision for recall of municipal officials, but they cannot do that as to constitutional officers. F.W.G.

DOG PATROLS FOR CRIME IN PUBLIC PARKS

BY

BRUCE SMITH*, as told to A. E. HOTCHNER

(From "This Week" Magazine of May 23, 1954, Reprinted by permission of the Boston Herald-Traveler)

When night falls, the big-city parks of America become a happy hunting ground for every stripe of criminal. Teen-age hoodlums, muggers, vandals, murderers and sexual perverts have terrorized our parks to the point where in some cities citizens are now warned to stay out of them after dark.

That criminals have come to rule our beautiful parks is a sad disgrace. Instead of being a source of pleasure and relaxation—a breath of the country for city-bound people—parks have become a peril that has defied our police. We must drive these hoodlums out of the parks and make them safe again—but how? A park by its nature is a natural habitant for criminals. It is a vast area, full of shadowy hiding places. No city can afford the army of patrolmen that would be needed to adequately cover such an expanse.

But every city can afford the park protection system that I have just observed in England. Scotland Yard has furnished me with the details on how it works, and I am going to elaborate on them for you in this article. Actually, one word tells the story: dogs.

When World War II ended, probably no park in the world was more beset with crime than London's Hyde Park. Sex assaults,

* Bruce Smith is head of the Institute of Public Administration, has surveyed police work in 50 U. S. cities.

muggings, thievery and vicious hooliganism had increased during the war years to the point where, in 1946, Scotland Yard had to admit that it couldn't cope with it. London's Police Commissioner, Sir Harold Scott, recently retired, realized that his police were at too great a disadvantage in the park, and that somehow they needed to increase their mobility, their night sight and their sense of detection.

Working on the theory that thoroughly disciplined dogs might make up for some of these deficiencies, the Commissioner put a few dogs on duty on an experimental basis. The police who had been trained to handle them had volunteered for the jobs. The dogs were Labrador retrievers and Alsatians (the Alsatian is the British name for the German shepherd) and had been superbly trained for night patrol. When unleashed, they would streak across terrain a policeman could not cover, and rout lurkers hiding in bushes or other dark places.

They were trained to grab the fugitive's wrist on command and hold fast until the policeman arrived. Theoretically, they seemed like an asset, but there is often, in police work, an unbridgeable chasm between theory and practice.

The instantaneous success, however, of these police dogs has been unbelievable. They were exactly the eyes, the sense of smell and the swiftness that the police assigned to the park needed. They made an astounding number of arrests. The muggers and rapists of the park could no longer depend upon the protection of the night, for out of the darkness a noiseless form might suddenly pounce on them. What actually happened was that the terrorists became terrorized.

The training program was immediately stepped up. Doberman pinschers were also found very suitable to this work and by 1949 there were 20 dogs on patrol every night. Their vigilance was paying off handsomely. For example, Hyde Park in the summertime had always been subjected, among other things, to a wave of handbag snatching. But to the Police Commissioner's gratification, frequency of these crimes has been reduced from 214 cases in 1948 to only 18 cases in 1952.

Good reports on the dogs flooded the Commissioner's desk. A young woman had been accosted by a thief in Hyde Park. It was 1 a.m. and the park was deserted, but a passerby heard her screams and ran to help her. The thief kicked the man in the groin and he fell to the ground in helpless agony.

The thug then punched the woman in the stomach and tried to make her release the money she was clutching. Two patrolmen and their dogs came running on the scene. The thief saw them and ran into covering darkness.

Without the dogs, the police would never have caught him. But when the Alsatian dogs, Jim and Prince, were unleashed, they quickly overtook their fleeing quarry and brought him to the ground. Jim had him by one wrist and Prince by the other when the policemen caught up with them. The thief had not been bitten or harmed in any way, and an important arrest had been made.

On another occasion, a gang of 12 teen-agers from the tough King's Cross and Islington sections invaded the park. Like some of our own teen-age gangs, they smashed benches and chairs, tore down posts and fences, destroyed whatever they could. Two of the park's best dogs were in the vicinity. They tracked the gang for their handlers, and when unleashed, performed the incredible feat of rounding up all 12 of the gang.

London's police were discovering that a working dog often instills such fear in a criminal that he freezes—and any cop will tell you that a frozen thug is in the best possible condition.

By 1950, the dogs' park record was so phenomenal that they were being assigned to duty in all of Londan's police districts. Ben, a Labrador, had 85 arrests to his credit; Rajah, an Alsatian, had 38. In three years, Hyde Park had been completely cleaned up. It was attributed not so much to the actual arrests the dogs made as to the fact that the underworld no longer wished to invade an area patrolled by dogs.

By 1951, 61 dogs were on duty all over London, and they responded to 476 calls and made 90 arrests. Ben had increased his arrests to 102. In 1952, the 70 dogs on duty answered 993 calls and made 115 arrests, and in 1953, with almost 90 dogs in use (this is the full quota), 130 arrests were made. These dogs now do more than patrol the parks, although that is still their primary duty. They track and capture housebreakers, and they have broken up many a burglary.

When a very dangerous mental patient was discovered to have escaped, a Labrador was hurried to the institution. He immediately picked up a scent, tracked the patient for over a mile, subdued him despite violent resistance and, according to the official report, within 15 minutes of the time the dog had been called, the patient was back in his room.

There are many cases on record of policemen who have suddenly been slugged by criminals they are arresting. Invariably their dogs have pursued the offenders and captured them. Curiously, despite the fact that many of the criminals they capture have weapons, no dog has yet been killed.

Brigadier Dunn, Commandant of the National Police College, told me about one London dog who has proved invaluable in narcotics work. This dog is extremely sensitive to the smell of marijuana and other habit-forming drugs and can immediately spot them in a room or on a person—an invaluable sniffer indeed.

Now, in suggesting that we adopt the English system and put dogs to work in our parks, I want to emphasize that there is no substitute for a good policeman. In other words, good dogs, plus poor policemen, will not give us good protection. As former Commissioner Scott has said, "The dogs are now firmly established as an integral part of the force and are doing something to make up for the serious deficiency of men. But dogs are temperamental creatures

and possess powers largely unknown to us. They react to the mental condition of their handlers, and it is essential that officers employed in this duty should be keen policemen, physically and mentally alert at all times. Only by attainment of these qualities by handlers themselves shall we obtain the best results from our dogs."

A dog, therefore, is no better than his handler. But, unfortunately, in many U. S. cities, the man assigned to park duty is known as a "sparrow cop." This is a derogatory term that labels him as a second-rate or troublesome officer. His morale is usually poor, and more often than not he loafs at his job.

This kind of man can't be assigned to dog patrol. As a matter of fact, we must do what the English do—use only policemen who volunteer for this duty. For these men must train with their dogs, they must love and respect them, they must take care of them. This is what makes a dog effective, keeps him from going sour.

Here, then, is a program that I think would be effective:

1. Eliminate the park as a Siberia for policemen. Give handlers and their dogs a deservedly important status.

2. Really crack down on park criminals, first offenders or not. A good dose of maximum penalties to convicted offenders will let the underworld know your city means business.

3. Keep the lovers out of the bushes and inaccessible places. This is not a "moral" suggestion but a practical one. These people invite blackmailers and muggers and exhibitionists. And once this element comes into the park, looking for lovers to prey on, they often switch their attentions to elderly people and other likely subjects. The dogs will keep lovers as well as criminals out of the shrubbery and this is for the best. Shrubs have been planted there to beautify the landscape—and to keep our parks safe they should be kept for that purpose only. A boy and girl can enjoy the moon just as well from a park bench.

4. Cities should eliminate separate police commands that operate in the park. In this way the "sparrow cop" would disappear. Park duty should come on regular rotation, so that the park will no longer be considered a Siberia, a remote and unwanted assignment.

The dogs have one additional advantage that should be mentioned—they help eliminate the growing abuse of the quick bullet. More and more policemen are firing their guns at people who run from them.

A 16-year-old boy is seen to rattle an automobile door, a cop orders him to halt, he runs, the cop shoots, first in the air, then for effect, and the kid is killed. The dog's ability to overtake a running suspect will help to abate this alarming practice.

I think that many cities should put dogs to work in their parks as soon as they can—and elsewhere throughout the city as they are needed. New York is seriously thinking of adopting the system. We can chase the criminals out of our parks, where they have been able to hide so easily, and so give our parks back to the people to whom they belong.

OBSERVATIONS ON MUNICIPAL LAW CASES DECIDED IN 1953

BY

MARK E. GALLAGHER, JR.

President, City Solicitors and Town Counsel Association

The application of municipal law affects a great number of people; sometimes its impact isn't too apparent, but since it deals with government at the grass-root level, almost anything that happens is important. This is reflected in the case load that reaches our Supreme Judicial Court each year concerning the conduct of municipal affairs. About every ten years the court is obliged to remind one and all of the traditional functions of the municipality and its officers, but even in one year a very complete cross-section of the field is placed under the judicial microscope. In the year 1953 there were about fifty such situations. The field was reasonably well covered.

There is a certain advantage to a review of these cases; not to brief them or to give a detailed analysis, but to note the revitalization of familiar legal concepts, the advent of trends in a new direction and the application of older legal theories to an advancing social order.

The headings in the review that follows are non-legal in a way that can only be understood by a lawyer. It is an attempt to classify the material as it might be indexed in the mind of a lawyer who works in the municipal law field. No other field emphasizes more the theme of protection; the protection of people, property, rights and institutions of government, whether the protection fends off an invasion from the legislature, municipal officials or aggressive citizens.

It would be more than presumptuous to say the Court has done a good job, but certainly there is satisfaction with and confidence in the Court.

CRITERIA FOR CONDUCT OF OFFICIALS

The Court was asked to review the conduct of officials, and in some cases it set up some standards. In the absence of illegal or arbitrary conduct an awarding authority's decision as to the lowest reasonable bidder won't be disturbed.[1] It declined to exercise inquisitorial powers of a general investigatory sort over a board.[2] However, a board must act collectively, not separately,[3] and a zoning board of appeal decision, on statutory appeal, is only of value for the purpose of aiding the court in its decree after the court has come to its own decision.[4] A city auditor must be more

1 Capuano v. School Bldg. Committee of Wilbraham, 1953 AS 781.
2 Nichols v. Dacy, 329 Mass. 598.
3 Alphen v. Shadman, 1953 AS 913.
4 Bicknell Realty Co. v. Board of Appeal of Boston, 1953 AS 997.

specific than to refuse payment merely because he thinks a fact-finding administrative officer made the wrong decision.[5]

The selectmen have a duty to be fair, judicial and reasonable in granting permits and not unreasonable, arbitrary, whimsical and capricious,[6] while the court will not judge the motives of an administrative board on a purely ministrative matter even though bad faith is found as a fact, unless a statute had made good faith essential to valid action.[7]

Sanctity of School System

The School Committee's administrative acts even on an assumption of bad faith will not be set aside by the court,[8] and any limitation on school committee authority must be in express language or, if to be implied, must be such that it will avoid interference in the traditional supremacy of the committee and not oppose the legislative policy that maintenance of adequate public schools is of paramount importance.[9]

Modern Growing Pains

The court characterized the functioning of a modern highway as being like a railroad system in that it had to be operated. It is a sort of self-contained unit, a package deal. The taking of land for restaurants on such a system to be leased for a public purpose was viewed as a far cry from the prohibition of a lunch wagon in a public square.[10] Stabling of horses as an accessory use in a resident-zone is no longer considered a necessary part of the design for modern living.[11] The Court noted that the trend in municipal government is to centralize power and responsibility in a mayor or manager.[12]

What a Statute Means

At least two hints for the draftsman appear, viz., than an ordinance or by-law that authorized the "exercise of powers imposed by general law" incorporates by reference General Laws,[13] and the fact that the increasingly favored clause to the effect that if part of an enactment is declared invalid the remainder shall be valid, contains a presumption that severability is contemplated.[14]

A special charter affecting school committees must yield to the general laws,[15] but city charters are a type of special act designed for a particular need, requiring strong terms to supersede them by

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5 Lenox v. City of Medford, 1953 AS 895.
6 Butler v. E. Bridgewater, 1953 AS 233.
7 Kelley v. School Committee of Watertown, 1953 AS 361.
8 Kelley v. School Committee of Watertown, 1953 AS 361
9 Casey v. City of Everett, 1953 AS 459.
10 Opinion of the Justices, 1953 AS 559, 567.
11 Pratt v. Bldg. Inspector of Gloucester, 1953 AS 615.
12 Williams v. City Manager of Haverhill, 1953 AS 211.
13 Casey v. City of Everett, 1953 AS 459.
14 Opinion of the Justices, 1953 AS 559.
15 Casey v. City of Everett, 1953 AS 459.

general enactment in parking meter purchase legislation.[16] Special charters do not survive any conflict with one of the Plan charters.[17]

A statute general in language represents a policy and the details to implement it may be delegated,[18] a corrective statute over-rides all previous laws inconsistent with it,[19] a permissive statute doesn't become mandatory if the authorized party doesn't care to make use of it.[20] A statute designed to provide relief from zoning restrictions, containing language giving authority over ordinances and by-laws, will nevertheless govern the Boston Zoning Law, a special statute.[21]

Essentials of Fair Play

A city manager can remove non-civil service personnel under Plan D or E charters without any cause, charges or hearing.[22] The civil service commission's procedure for notification of the public of its rules was approved,[23] and the question whether or not a board of appeals must give notice of its decision was left undetermined.[24] The public in dealing with municipal officers must ascertain at its peril the extent of their powers, and a municipality is not bound by estoppel.[25] Laches is not a good defense to the enforcement of a municipal ordinance.[26] The Court refused to recognize a non-conforming use privilege where a building was erected, but not *used* for a non-conforming purpose prior to the passage of the zoning ordinance.[27]

The inexorable course of litigation may be interrupted for a reasonable time if vital matters in the administrative field remain undetermined.[28] The Court found that an ordinance regulating the removal of loam was valid, but suggested that the selectmen should properly grant a permit to allow the owners to remove from the land, loam already stockpiled, if they believed the owner's claim that they stockpiled it prior to the effective date of the by-law.[29]

Sanctity of the Zoning Laws

In general a zoning ordinance will be upheld unless there is no substantial relation between it and the furtherance of any of the general objects of the zoning statute, and the burden is on the objector.[30]

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16 Haffner v. Director of Public Safety of Lawrence, 329 Mass. 709.
17 Williams v. City Manager of Haverhill, 1953 AS 211.
18 McNamara v. Director of Civil Service, 1953 AS 221.
19 Assessors of Springfield v. N. E. Tel. & Tel., 1953 AS 423.
20 Lavelle v. City of Beverly, 1953 AS 277.
21 Miller v. Emergency Housing Authority, 1953 AS 1011.
22 Williams v. City Manager of Haverhill, 1953 AS 211.
23 McNamara v. Director of Civil Service, 1953 AS 221.
24 Del Grosso v. Board of Appeals of Revere, 1953 AS 229.
25 Elbe File and Binder Co. v. City of Fall River, 329 Mass. 682.
26 City of Everett v. Capital Motors, 1953 AS 697.
27 City of Everett v. Capitol Motors, 1953 AS 697.
28 Talten v. Dept. of Public Utilities, 1953 AS 637.
29 Butler v. E. Bridgewater, 1953 AS 233.
30 Kaplan v. City of Boston, 1953 AS 657.

Additional safeguards in excess of statutory provisions, if set forth in the local zoning ordinance were approved by the court[31] and evidently the size of an accessory use isn't so important as its nature.[32] The Planning Board's function in a zoning change as purely advisory, and not a part of the legislative process, was emphasized.[33] The ability of a municipality to change an ordinance in the face of an applicant's proposed use, the court said, rested on the theory that no one has a vested right in the continuance of a zoning scheme,[34] and this is also true even under permit regulations to remove loam as distinguished from zoning regulations.[35]

The power to grant a variance for the erection of an apartment house was upheld where the land was across from a nursing home and had formerly been zoned as less restricted area;[36] it was denied where the area was under no greater handicap than contiguous areas; the factor of profitable use is not adequate alone.[37] Size alone doesn't determine a "spot" within the policy against spot zoning; relative location and size of other zones are also important.[38] An accessory use for a house, by the most liberal test, is one that is so necessary in connection with a one family house or so commonly to be expected with such a house that it cannot be supposed the ordinance was intended to prevent it.[39]

Exercise in Semantics

The court was called upon to define the words greenhouse and nursery as they appeared in the Needham zoning by-law. It wound up taking an inventory of a greenhouse and nursery store and excluded certain items from sale therein as being beyond the normal nature of such an enterprise. Fungicide, yes; Christmas wreaths brought in for sale, no.[40] Similarly, then, it inventoried the lunch bar of store to discover what should be called "machinery" among the gadgets and appliances found therein under the tax statute. To end future controversies of this nature the word was defined as a mechanical device which can fairly be said to be a machine.[41] The word citizen does not include a corporation for the purpose of qualifying as one permitted to bring mandamus to enforce a public duty of interest to citizens generally.[42] Plumbing includes installation of hot water tanks and gas heaters.[43] "Actually resided" means what it says and doesn't mean the equivalent of the word

31 Pratt v. Bldg. Inspector, City of Gloucester, 1953 AS 615.
32 Town of Needham v. Winslow Nurseries Inc., 1953 AS 303.
33 Caputo v. Board of Appeals of Somerville, 1953 AS 315.
34 Caputo v. Board of Appeals of Somerville, 1953 AS 315.
35 Butler v. E. Bridgewater, 1953 AS 233.
36 Miller v. Emergency Housing Authority, 1953 AS 1011.
37 Bicknell Realty v. Board of Appeals of Boston, 1953 AS 997.
38 Caputo v. Board of Appeals of Somerville, 1953 AS 315.
39 Pratt v. Bldg. Inspector, City of Gloucester, 1953 AS 615.
40 Town of Needham v. Winslow Nurseries Inc., 1953 AS 303.
41 Assessors of Haverhill v. S. S. Newberry Co., 1953 AS 755.
42 Pilgrim R. E. Inc. v. Supt. of Police of Boston, 1953 AS 495.
43 Springfield Gas Light Co. v. State Examiners of Plumbing, 329 Mass. 664.

domicile as used in other statutes, so far as settlement law is concerned.[44] The word "lot" in a zoning ordinance can mean a tract of land unless it is further defined therein; a lot "of record", presumably would be considered differently.[45] A garage is not the same thing as a freight terminal,[46] and one who steps in the public way momentarily may not necessarily be a traveler.[47]

Sanctity of the Finance Act

The granting of an easement which requires only honoring an agreement does not fall within the meaning of an incurred obligation under the finance act, but the court points out that the burden need not be exclusively financial to be subject to the act.[48] Taxpayers must qualify themselves to maintain the petition provided for by the statute.[49]

The role of the purchasing agent as a cog in the machinery set up to carry out the salutary and important purpose of the finance act was emphasized when the doubt over the contractual power provided in the parking meter legislation was resolved against allowing the legislative branch to handle the purchases without the services of the agent.[50]

Intramural Warfare

An Auditor can't refuse to accept a decision by a fact finding officer, board or council just because he isn't convinced by the evidence they heard.[51] An Assessor though entrusted with statutory duties and authority is still a municipal officer and may be removed by a city manager.[52] Ten Taxpayers' petitions are statutory proceedings and the petitioners must qualify. The best evidence of their qualification is the assessor's tax roll.[53] Veterans preference in promotion is constitutional even though it may practically foreclose non-veterans from advancement,[54] but teachers, having been promoted, can be demoted by the school committee.[55] The executive branch cannot exceed its authorization to enter into a lease if the terms are substantially destructive of the enabling order[56] and it cannot curb the traditional supremacy of the school committee in the field of education.[57]

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44 City of Cambridge v. City of Somerville, 329, Mass. 658,660.
45 Velter v. Zoning Board of Appeal of Attleboro, 1953 AS 935.
46 City of Everett v. Capitol Motors, 1953 AS 697.
47 MacKinnon v. Medford, 1953 AS 273.
48 Lynch v. City of Cambridge, 1953 AS 573.
49 Howe v. Ware, 1953 AS 777.
50 Haffner v. Director of Public Safety of Lawrence, 329 Mass., 709,713.
51 Lenox v. City of Medford, 1953 AS 895.
52 Williams v. City Manager of Haverhill, 1953 AS 211.
53 Howe v. Ware, 1953 AS 777.
54 McNamara v. Director of Civil Service, 1953 AS 221.
55 Kelley v. School Committee of Watertown, 1953 AS 361.
56 Elbe File and Binder Co. v. City of Fall River, 329 Mass. 682, 685.
57 Casey v. City of Everett, 1953 AS 459.

Proper Approaches for Relief

In appeals under the statute from decisions of the board of appeals, the time prescribed by the statute is of the essence,[58] and the trial thereafter is a trial de novo.[59] Mandamus is the proper remedy to require a public officer to perform a particular act which it is his legal duty to perform,[60] but a corporation can't invoke its use as a citizen.[61] A proceeding in abatement is appropriate to determine the validity of a tax.[62]

The declaratory judgment procedure was used to secure the interpretation of a special statute,[63] to test a zoning ordinance in the Land Court, [64] to question the validity of an ordinance regulating permits[65] and to secure a definition of plumbing.[66]

Defense of the Public Domain

No private right of way can be acquired by adverse use in travelling over a bridge which is part of the public highway, if any easement exists it dies with the removal of the bridge.[67] Police may allow parking in the streets by members of the legislature, because of existing conditions, character and use of buildings in the neighborhood and because an exception in their case is a rational classification of a non-discriminatory nature.[68]

Rewards of Employment

Neither contributory nor non contributory pension allowances are based upon contract and no vested rights exist even after payments are begun. In fact the status of an overdue payment is open to question.[69]

Conclusion

The progress of the law in this field can be as exciting to follow as any there is. It is hoped that a reader will be charitable in his thoughts as to the sins of omission and commission.

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58 Del Grosso v. Board of Appeals of Revere, 1953 AS 229.
59 Bicknell v. Board of Appeal of Boston, 1953 AS 997.
60 Nichols v. Dacey, 329 Mass. 598, 600, 601.
61 Pilgrim R. E. Inc. v. Supt. of Police of Boston, 1953 AS 495.
62 Assessors of Everett v. G. E. Company, 1953 AS 747.
63 Lavelle v. City of Beverly, 1953 AS 277.
64 Kaplan v. City of Boston, 1953 AS 657.
65 Butler v. E. Bridgewater, 1953 AS 233.
66 Springfield Gas Light Co. v. State Examiners of Plumbing, 329 Mass. 664.
67 Chelsea Yacht Club v. Mystic River Bridge Authority, 1953 AS 865.
68 Comm. v. E. Porter Sargent, 1953 AS 1007.
69 Kinney v. Contributory Retirement Appeal Board, 1953 AS 549.

FEDERAL TAX LIENS AGAIN

By ROGER D. SWAIM

The decision in the recent case of United States v. New Britain, 347 U. S. 81 should be reassuring as to priority of mortgages over later federal tax liens.

In that case mortgages had been foreclosed producing a sum in excess of the amount due on them and amounts due judgment creditors and the controversy was between the United States for tax liens and the City for unpaid real estate and water taxes.

After discussing other questions, the court noted that the federal statute did not by Section 3670 of the Internal Revenue Code attempt in terms to give priority to such federal liens as Section 3466 of the Revised Statutes, 31 U.S.C. Section 191 does where the debtor is insolvent. It then cites the principle of first in time first in right and thinks Congress had this cardinal rule in mind in enacting Section 3670, and that any funds in excess of the amount necessary to pay the mortgage and judgment creditors should be applied to the federal liens before application to the city's taxes. "There is nothing in the language of Section 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories set out." That section provides in (a) that "such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed."

It does not appear in the case whether or when notices of the federal liens had been filed and the language of Section 3672 is unfortunate in leaving open the question of priority after notice of the lien is filed, but the decision by comparing the absence of provision for priority with the provision for priority in the insolvency statute is helpful.

JOINT ACCOUNTS—THE NEW HAMPSHIRE STATUTE—WHY NOT?

By KENNETH B. BOND

On May 14, 1953, C.162 of the 1953 Laws of New Hampshire became effective. It is called "An Act Relating to Joint Accounts and Distribution Thereof." The substance of the Act is that whenever a bank account is maintained in the names of two persons payable to either of such persons, and to the survivor, the account shall, upon the death of either of them, become the property of the survivor, irrespective of whether or not the funds deposited were the property of only one of them, and irrespective of whether or not the depositor intended to vest the other with a present interest.

It appears to the writer that a similar statute might well be adopted in other states. It would avoid a lot of confusion in the

settlement of small estates. It would also avoid a lot of litigation. Why not?

The full text of the New Hampshire, Chapter 162 of 1953, reads: *"An Act relating to Joint Accounts and Distribution Thereof.*

"1. *Distribution of Joint Accounts.* Whenever any account shall be maintained in any bank doing business in this state in the names of two persons payable to either of such persons, and payable to the survivor of them, the said account shall upon the death of either of said persons become the property of and be paid in accordance with its terms to the survivor, irrespective of whether or not the funds deposited were the property of only one of said persons, and irrespective of whether or not at the time of the making of such deposits there was any intention on the part of the person making such deposit to vest the other with a present interest therein, and irrespective of whether or not only one of said persons during their joint lives had the right to withdraw such deposit, and irrespective of whether or not there was any delivery of any bank book, account book, savings account book, certificate of deposit, or other evidence of such an account, by the person making such deposit to the other of such persons.

"2. *Definition.* The term bank in section 1 shall apply to state banks, mutual savings banks, guaranty savings banks, national banking associations, building and loan or co-operative banks, Morris Plan banks, trust companies, federal savings and loan associations and credit unions.

"3. *Application of Act.* This act shall apply to all types of accounts in the above-named institutions, whether such account is represented by a certificate, an account book, or by any other form of document, as well as to checking accounts.

"4. *Construction.* Nothing contained in this act shall be construed to prohibit the person making such deposit from withdrawing or collecting the same during his lifetime, nor shall the fact that such person had the right to withdraw or collect said deposit during his lifetime operate to defeat the rights herein provided for the person or persons surviving such depositor.

"5. This act shall in no way affect the provisions of section 20, chapter 309 relative to savings banks and section 8, chapter 314 relative to building and loan associations as well as sections 3 and 4, chapter 87 relative to the inheritance tax.

"6 *Invalidity.* The invalidity of any part of this act shall not affect the remainder of this act.

"7. *Takes Effect.* This act shall take effect upon its passage. (Approved May 14, 1953.)"

For the first reference to it in the New Hampshire reports see Cournoyer v. Monadnock Savings Bank, 102 A. 2nd 910, A. S. March 1954.

SOCIAL SECURITY FOR LAWYERS AGAIN

In our April issue (Vol. 39, No. 1, pp. 27-44) we reprinted articles on both sides of this question and stated that we should be glad to hear from anyone on the subject. Since then the press reports the passage, by a very large majority in the House, of a compulsory act extending the coverage to everyone. As the matter is still pending before the Senate we call attention to letters received since the appearance of our April issue.

1. A letter from Harold M. Siskind, Esquire, President of the Lawrence Bar Association calling attention to the action of that association in favor of extending the coverage "to make lawyers at their option eligible". As pointed out in the April issue (p. 27) the Massachusetts Bar Association so voted at the annual meeting in June 1953.

2. A letter from John M. Mullen, Esquire of the Massachusetts and the New Hampshire bars as follows:

"To the Editor:

"In the April issue of the 'Quarterly', the suggestion is made that there be further discussion of Social Security for lawyers.

"The ABA Journal for February 1954 (p. 96) contained a letter by me in which I told of the circumstances under which the New Hampshire Bar Association overwhelmingly voted in favor of both social security coverage and a tax deduction for retirement savings. Following the publication of said letter, I had correspondence with lawyers in various parts of the country. For example, a lawyer from California suggested that few lawyers "could afford to accept the benefits when they came due". Readers of the "Quarterly" may be interested in the following reply to his letter:

"This subject deserves far more attention than it has thus far received from the organized bar.

"It seems to me that Dean Larson's article in the November ABA Journal is an excellent statement of coverage. Permit me to make the following observations:

"1. The social security system is intended to provide a minimum amount of insurance against loss of earnings resulting not only from old age but also from death. The older members of the bar have a duty to consider the circumstances in which the family of a young lawyer finds itself in the event of his untimely death under existing economic conditions.

"2. In the matter of retirement, social security is only the first layer of protection; it should be supplemented by a tax deduction for retirement savings. The organized bar should be far more active than it has been in obtaining an amendment to the tax laws which will put self-employed persons on a parity with corporate employees in this regard.

"3. The earnings limitation for self-employed persons is currently on an annual rather than a monthly basis. It is certain to be revised and in all probability a sliding-scale arrangement will be adopted.

"4. It is fallacious to think that employed persons automatically

retire at 65 while self-employed persons never retire. I suggest that even in California you may be able to find a few members of the bar who, in their old age, are far from being "elder statesmen." On the other hand, by way of example, when the local Boston and Maine railroad last week decided to lower the retirement of its engineers to seventy, the columns of the local papers were filled with the names of those to be laid off. In fact, three of the gentlemen who as of today are hurtling locomotives over New England's rocky hills are over eighty.

"5. As the ABA committee pointed out, lawyers already pay part of the cost of the social security system; that certainly is not a reason why they should get none of its benefits.

"I should like to conclude with a personal note to the effect that my personal interest in the passage of the pending legislation is quite remote; in fact, if coverage were optional, I should not, at the present time, elect to be covered. However, on the basis of my experience in handling the estates of certain deceased lawyers, I am convinced that an injustice has been done to many of my brethren at the bar in depriving them of the opportunity to obtain social security coverage. Further, a substantial part of my practice in recent years has consisted of representing employers in negotiations with labor unions. In the course of my work on corporate pension plans, I reached the conclusion that a real inequity exists in the matter of retirement problems between self-employed professionals and the employees of corporations.

"I hope that the members of your association have the opportunity to give this problem the careful consideration it deserves. I venture to predict that their reaction may not be unlike that of the lawyers of my native State of New Hampshire where, as you may know, a man's education is not considered complete unless he has been trained from infancy to recognize the sound of a dollar bill landing on a feather bed behind a three-foot oaken door."

3. We received one letter suggesting that the ABA committee had "reached its conclusions based up on hearsay opinions rather than facts." As we pointed out in the April issue; that committee, as requested last August, is to make a fuller report at Chicago next August, after getting further information from all state bar associations, and one hundred or more local associations throughout the country.

Whether anyone agrees with them or not, the members of the ABA Committee are experienced men. As explained by the chairman, Mr. Oliver:

"The personnel has been continuous during the four years of its service—the expert of the Standard Oil, the expert of the United States Steel, a Vice-President and General Counsel of a large insurance company in Boston; the General Counsel for another insurance company; the head of the Unemployment and Social Security program of the State of New York; and two practicing attorneys, one from the largest city in the world, the other a country practitioner, your speaker. So we have had somewhat of a cross-section of our Association."

Is "Social Security" "Insurance" in a Sound Business-like Sense or is it simply a Second "Income Tax" under a "Social" Name?

We do not remember seeing or listening to much of any discussion by lawyers of the "business" aspect of this problem as a government undertaking. As our purpose in publishing these discussions is to stimulate thinking by the bar, we reprint the following editorial from the Christian Science Monitor of June 4, 1954.

"The overwhelming vote by which the Social Security extension bill passed the House of Representatives (355 to 8) could easily create an illusion that the old-age benefits program inaugurated under the Social Security Act of 1935 had become politically non-controversial.

"This is perhaps true in the sense that neither political party can afford to be placed in the position of opposing the general purpose of providing as much financial security as is feasible for older people of reduced earning power. But there are breakers ahead in the fact that within another couple of decades, approximately, both political parties will come into collision with cold figures as to what the Social Security System, under its present or projected scale of taxes, will support in the way of benefit payments to the millions of claimants who will then become eligible.

"The $18 billion or more now in the old-age insurance trust fund sounds like a very large sum of money. But if it were really to serve as an insurance reserve in the actuarial sense of the word it would need to be many times larger than it is—by some estimates probably at least 10 times as great. In other words, when the promises now made begin to come due there will have to be resort to general taxation or to a very much stiffer increase than has yet been contemplated in payroll taxes and other contributions.

"Far from facing this prospect, the House and administrative bill continues present rates until 1960 while broadening materially the areas of coverage and increasing (as seems necessary) the benefit rates. Surely some reserve is better than none at all, and in this respect the House vote was a sharp rejection of the miscalled 'pay-as-you-go' or noncontributory, taxsupported, flat-rate pension or welfare plan proposed as an alternative.

"Now, in order to absorb society's accrued responsibilities to the millions who had already put in the greater part of their working years before Social Security reached them, there may eventually have to be a government contribution to the old-age trust fund outside the worker and employer or self-employed contributions. But unless there is a disposition to raise Social Security taxes more rapidly and to restrain the giving away of new benefits from the trust fund, all resemblance to insurance will be soon lost. To prevent this is a bipartisan responsibility."

Just how good is all this going to be for the young lawyer and his family of the future? We do not pretend to know, but he, or somebody, will have to think about it sooner or later as they will have to think about the following subject. F.W.G.

THE PROPOSED AMENDMENT TO LIMIT FEDERAL TAXATION AND ITS HISTORY

By RAYMOND F. RICE *of the Kansas Bar*

(From the A.B.A. Journal of June 1954)

FOREWORD

Observation and conversation suggest that lawyers think less about this far greater problem than they do about their "Social Security". It seems even doubtful whether most of us are even conscious of the fact that a strongly supported and strongly opposed Federal amendment is pending before Congress.

In the "Quarterly" for October 1952 (Vol. 37. No. 3. pp.33-56) we called attention to the movement, beginning in Wyoming about 1939, for a Federal Constitutional Convention to propose a tax limitation, to the inconsistent "Resolutions" of the Massachusetts legislature of 1941 and 1952, to the draft for an Amendment debated and approved by the House of Delegates of the American Bar Association in 1952, and to Dean Griswold's vigorous article in opposition which was printed in full and should be read.

The subject has been repeatedly discussed from both sides in the American Bar Association Journal. Subsequent to 1952 the draft amendment was revised to meet some of the objections by the committee of which Hon. William Logan Martin of Alabama, is chairman and the revised draft was approved by the House of Delegates of the Boston meeting last August. It is now pending in Congress. The latest discussion of it has just appeared in the June number of the A.B.A. Journal by Raymond F. Rice, a practitioner at the Kansas bar, a former law professor, and, presently, a member of the Kansas Bar Examiners since 1941. As it is a vigorous article containing the history of the movement, we reprint most of it for the consideration of those who have not read it in the A.B.A. Journal, but whose interests are directly involved.

F.W.G.

MR. RICE'S ARTICLE

Forty years ago state legislatures contended for the distinction of casting the final vote required for the ratification of the Sixteenth Amendment. The tax infant thus fathered has grown so amazingly in stature that today the states find the shackling of the giant they themselves created a Herculean task. . .

Decisive as was the final result, it had been preceded by four controversial years during which the question was warmly debated both within and without the legislative halls wherein the amendment was under consideration. On the one hand the proposed levy was branded as an assault upon thrift and a tax on success. Gladstone's observation that "the income tax makes a nation of liars"

was freely quoted and it was further urged that the levy was not only wrong in theory but unworkable in practice, as countries which, like Germany, were most successful in collecting a tax upon incomes had found it necessary to employ a vexatious system of espionage and inquisition which we would never countenance. With equal vigor the proponents of the amendment asserted that a levy on income would not only equalize tax burdens by requiring every citizen to contribute according to his ability but would bring home to the individual taxpayer his responsibility for his government. Objections to the granting to Congress of unlimited income taxing authority were brushed aside with the assurance that only a modest levy was contemplated and that any rate ceiling was wholly unnecessary.

No new taxing power is destined long to remain unexercised and immediately following the certification of the Sixteenth Amendment legislation for its activation was introduced in Congress. There the opponents of the levy made their last stand. In the Senate, Elihu Root assailed the income tax bill as a sectional measure, directed by the agricultural areas of the West and South against the industrial East and designed to cast a disproportionate burden of taxation upon a few states, New York in particular. However, all opposition was unavailing and on October 3 the Income Tax Law of 1913 became effective.

Fears as to the impact of unrestricted income taxing power were temporarily set at rest by the 1913 law. This was an anemic enactment, casting no shadow of future bloated bills. . .

Through the pyramiding of rates and the paring of exemptions, individual and corporate income tax payments have skyrocketed from a scant 72 million dollars during the initial year under the 1913 law to an estimated 50 billions for the current year. Thus the income tax now accounts for more than 80 per cent of all federal tax collections—a figure that conforms exactly to the pattern of the "heavy progressive income tax" proposed by the Marx-Engels Communist Manifesto as a most effective device for the destruction of private enterprise.

As an ever-increasing proportion of the national income is channeled into Washington, the states find themselves sitting at the second tax table with a goodly portion of the victuals already consumed. How their rations are being still further reduced is illustrated in states having their own income taxes. With the ballooning federal taxes a deductible item, there remains less and less of net income to be subjected to the comparatively moderate state levies.

Watered and fertilized by the flood of easy income tax dollars, there blossomed a new device for federal spending—the so-called "grants in aid" to the states. No more specious scheme could have been devised for the ultimate destruction of the sovereignty of the states, leaving to them little more than their historic names and established boundaries. The undermining of state independence is an insidious process. Far easier it is to become enmeshed in a

Washington-woven web of grants and contributions, with their attendant conditions, controls, regulations, restrictions and directives, than to find a way of escape. A hopeful sign is apparent in the growing realization that the alluring slogan "free federal aid" is only a clever combination of weasel words. This conviction was voiced by the General Assembly of Indiana in a challenging resolution asserting:[3]

We have decided that there is no such thing as "federal aid". We know that there is no wealth to tax that is not already within the boundaries of the 48 states. So we propose henceforward to tax ourselves and take care of ourselves. We are fed up with subsidies, doles and paternalism.

At a subsequent session the Indiana legislature gave a graphic illustration of the shrinkage of a typical tax dollar on its round trip to Washington. It was pointed out that from the 1½ cent federal gallonage tax on all gasoline sold within the state, the national treasury had in 1950 received $15,025,176, but had sent back to Indiana under the federal highway aid program only $10,697,523. Congress was therefore memorialized not only to refrain from enacting the then-pending measure for the increase of the levy but to repeal the entire tax.[4] Instead, a 33⅓ per cent increase in the gallonage tax was written into the Revenue Act of 1951.

An unrestricted income tax has a particular appeal both to the vote-seeking politician and the starry-eyed reformer. The political possibilities of such a levy are limitless and it is made to order for use by reformers who reject the time-honored theory that the primary function of taxation is the raising of revenue and hold, with the leftish German professor, Adolf Wagner, that taxation should be used to effect social changes. How a graduated income tax with progressive rates may be so employed has already found illustration in England. Nor should we forget that only a few years ago the proposal was here made that a salutary redistribution of wealth might be effected by limiting all individual incomes to $25,000 per annum.

There has thus grown through the years the conviction that the Sixteenth Amendment has not worked out in practice as was planned and promised and that the failure to place some restriction on the power of Congress to tax incomes was a grave oversight. As early as 1938 it was proposed that Congress should itself initiate action to supply this omission. That body, however, displayed the enthusiasm for a ceiling upon taxes that might be expected from an urchin who had been asked to surrender his lollipop. Inaction by Congress passed the initiative to the states where, strangely enough, the very state whose vote had given life to the Sixteenth Amendment became the first to seek for it the death sentence. The Wyoming legislature in 1939 adopted a resolution proposing that

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[3] Acts 1947, Indiana, 85th Session, c. 377.
[4] Acts 1951, Indiana, 87th Session, c. 342.

the income tax amendment be wiped out and that there be substituted a restricted grant limiting to 25 per cent the maximum tax on incomes and inheritances.

This action aroused little immediate interest. After a quarter-century, the income tax had so firmly established itself as a part to attack. Nor was ready acceptance of a proposal for tax reform initiated by a sparsely settled Western state to be expected. Yet within a year Rhode Island and Mississippi had followed the lead of Wyoming. Like action was taken by Iowa, Maine, Massachusetts and Michigan in 1941. During 1943, the enlistment of Arkansas, Indiana, Pennsylvania, Delaware, New Hampshire, Illinois, Wisconsin and Alabama more than doubled the ranks of the crusaders for an income tax ceiling. After New Jersey and Kentucky had fallen into line in 1944, the drive halted until Nebraska enrolled in 1949 and Louisiana in 1950. 1951 marked the beginning of a new advance, with Montana, Nevada Kansas, Florida and Utah as fresh recruits and with Georgia and Virginia joining early in 1952.[5]

With a congressional roadblock barring the usual route to constitutional amendment by way of a proposal submitted by Congress to the states for ratification, the proponents of income tax limitation were forced to travel a never-before-used detour. They sought, through resolutions by the legislatures of thirty-two states, to compel Congress to call a convention for the consideration of their proposal. The length of the detour thus taken is evidenced by the fact that while the Sixteenth Amendment was incorporated into the Constitution within less than four years following its submission to the states, the countermovement, after fifteen years, is still short of its goal. Likewise, the road traversed has been far from smooth. Powerful opposition, which has included the C. I. O. and other segments of organized labor, has succeeded not only in defeating the proposed resolution in some states and in blocking its passage by more than one branch of the legislature in others, but even in bringing about the reversal of favorable action previously taken in a half dozen states.

Progress toward the thirty-two state objective, if slow, was steady. But with the approach to the goal, unforeseen difficulties loomed large and the proposed convention began to appear more difficult of attainment and less desirable than when viewed from a

[5] To the twenty-six states listed, New Mexico and Texas are sometimes added. The New Mexico resolution (Laws 1951, pages 543-7), however, did not propose a tax limitation amendment, but rather the setting apart of all federal levies on individual and corporate income in excess of a fixed percentage thereof as a special fund for the reduction of the national debt and for distribution to the states.

The office of the Secretary of State of Texas reports that while it has often been asserted that the proposal was adopted by the Texas legislature in 1943, this statement is erroneous.

distance. While Article V of the Constitution makes mandatory compliance by Congress with a convention call by two thirds of the states, by whom and how was it to be determined whether the requisite number had acted? Here debatable legal questions would almost certainly be posed by the lapse of time since the initial action by Wyoming in 1939 and by the variations in the form of subsequent resolutions, as well as by the attempted veto or repeal of favorable resolutions adopted in a number of states.[6] When and if called, a convention would be confronted with preliminary problems of representation, organization and procedure, and ultimately with the basic question of agenda. In his exhaustive "Study of the Amending Power in Article V", in the January, 1953, issue of the AMERICAN BAR ASSOCIATION JOURNAL, William Logan Martin has shown that such a convention would not be restricted to the framing of a tax limitation amendment. If the delegates might instead proceed to rewrite the entire Constitution, a veritable Pandora's box would be opened.

These difficulties and dangers caused the pendulum to swing again toward direct action by Congress on a specific amendment, to be submitted to the states in the orthodox manner. A proposal to that end was placed before Congress in 1951 by joint resolutions introduced in the House and Senate by Representative Reed and Senator Dirksen, both of Illinois. The Reed-Dirksen Amendment proposed to limit the peacetime power of Congress to impose taxes on income.[7]

This proposal died with the 82d Congress but in January, 1953, its sponsors introduced in the new Congress a resolution designed to obviate certain objections to the previous draft. The amendment now pending, like the earlier proposal, would ban the imposition by Congress of death and gift taxes and, similarly, would fix a normal maximum income tax rate of 25 per cent. However, the 1953 resolution, instead of authorizing Congress by vote of three fourths of the members of each house to fix a maximum peacetime rate of 40 per cent and to suspend the limitation entirely during national emergencies created by war, would permit Congress, at any time, by such three-fourth vote and for periods not exceeding one year each, to raise the 25 per cent ceiling without limit, subject only to the proviso that when the top income tax rate exceeded 25 per cent, the highest rate so fixed should not exceed by more than 15 percentage points the lowest taxation rate on incomes. This compares with a present spread of almost 70 per cent and such restriction, it

[6] The Pennsylvania and Montana resolutions were vetoed and rescinding resolutions were adopted in Arkansas, Alabama, Illinois, Iowa, Kentucky, Rhode Island and Wisconsin.

[7] An analysis of the original Reed-Dirksen Amendment will be found in the report and recommendations on the Proposed Income Tax Amendment by the Special Committee of the American Bar Association. (Advance Program, 75th Annual Meeting, American Bar Association, pages 77, 78.)

is believed, would curb excessively high rates and thus make for a better balanced income tax structure.[8]

Certain it is that the states have an interest, co-equal with that of the national government, in a sound and well-balanced tax structure. The proposed constitutional amendment would present a clearcut issue as to the part to be played by the federal income tax in our future fiscal system. For the submission of such an amendment, the year 1955 would be most opportune, as during the present year regular legislative sessions will be held in no more than twelve states.[9]

History does not record that, as the ides of March approached, Michaelangelo laid aside mallet and chisel to take up the stylus, nor have we proof that Leonardo da Vinci listed in any tax return his honorarium for the painting of the Mona Lisa. Yet the fact remains that during the golden age of art in Florence there was in effect there, as in other Italian cities, the prototype of the present-day income tax. Two centuries later, the profligate Louis XIV, digging deep for untapped sources of revenue, came up with a tithe on the incomes of his subjects, known as the *dixiéme*, or royal tenth. Across the channel, William Pitt sought to equalize taxation burdens by the introduction, as early as 1799, of an income tax in modern form. Early colonial levies contained the germ of a levy on incomes in "faculty taxes", with ability to pay the measure for assessments against doctors, lawyers, expert mechanics and occasionally less skilled workmen.

Prior to the ratification of the Sixteenth Amendment levies on income had twice been engrafted upon our national fiscal system. The income tax of 1861, being purely a war revenue measure, was soon erased from the statute books. No such temporary status was contemplated for the income tax of 1894. Written into the Wilson-Gorman Tariff Act, it was designed not only to replace revenues lost by the lowering of duties but as a permanent remedy for inequalities in taxation. Defective and discriminatory in many respects as well as vulnerable on constitutional grounds, this levy was speedily stricken down by the Supreme Court.[10]

Our constitutional mills grind slowly. Almost fifteen years were required for the repeal of the prohibition amendment. The testing

[8] A full discussion of the revised Reed-Dirksen Amendment is included in the article by Robert B. Dresser in the March, 1953, issue of the *American Bar Association Journal*, entitled "The Reed-Dirksen Amendment: Developments in the 83d Congress".

[9] In 1955 there will be regular legislative sessions in forty-four states. During 1954 such sessions will be held in no more than twelve states, since the prevailing pattern calls for biennial sessions, held in odd-numbered years, with legislatures convening each year in 8 states and biennially in even-numbered years in 4 others.

[10] *Pollock v. Farmers' Loan and Trust Company*, 157 U. S. 429; rehearing 158 U. S. 601 (1895). Justice Stephen J. Field, who wrote the concurring opinion in this case, is invested with a prophet's mantle by Samuel B. Pettengill in his article, "The History of a Prophecy; Class War and the Income Tax" (*American Bar Association Journal*, June, 1953)

of the Sixteenth Amendment has now extended through more than four decades. Only with the accumulation of evidence that unrestricted power to appropriate income had been used to set up an unbalanced tax structure with confiscatory rates which were destroying the incentive for production and drying up the sources of risk capital, and that progressive levies on income were being employed to further questionable social and political ends, was the soundness of the Sixteenth Amendment seriously called into question. A distinguished authority on public finance has gone so far as to assert that:[11]

"When a future Edward Gibbon writes the history of the decline and fall of the American republic, the date he will use to mark the beginning of that decline will be March 1, 1913. On that date the people sanctioned federal taxation of incomes with no thought of restraint upon the abuse of this method, or of the evils that would be produced by abuse."

Happily, the gloom of this pessimistic prophecy is pierced by a ray of hope. It has now been amply demonstrated that unrestricted federal taxation of income stimulates reckless spending and breeds ever-increasing centralization of power. It is equally patent that if such a national levy holds state sovereignty under restraint, the states still carry the keys to their prison.

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[11] Harley L. Lutz, Professor Emeritus of Public Finance, Princeton University; Financing the War—A symposium conducted by the Tax Institute, December 1-2, 1941, Philadelphia, Pennsylvania, page 150.

GOD'S LAW AND THE FIFTH AMENDMENT

A sermon by REV. ALEXANDER ST. IVANYI*

* Former member of Hungarian Parliament and resident of Budapest during the siege. Lecturer at Harvard, M.I.T., B.U., Tufts and Northeastern; recipient of Certificate of Gratitude from Allied Command. In 1952 he addressed the Massachusetts Bar Association at the mid-winter meeting in Worcester on "Freedom in Front of and Behind the Iron Curtain."

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FOREWORD

In the April issue of the Quarterly (vol. 39 No. 1) we printed in full the address by Dean Griswold on "The Fifth Amendment" at the Spring Guild meeting of the Massachusetts Bar Association in February and another address on a related subject at Mt. Holyoke in March. As stated on page 82—"These speeches have attracted attention throughout the country. Thousands of copies have been requested. Members of the Association have requested us to print them in the "Quarterly" and we are glad to do so as they present certain of the historic ideas in American Bills of Rights (both State and Federal) more fully, and in better perspective, than we have seen them presented by anyone else. Whether you agree with the views expressed or not is your affair, but they deserve thinking about by lawyers living under a government of laws."

We have now been requested by members of the Association to reprint Dr. Ivanyi's Sermon and we are glad to do so as we venture to say that there are very few Americans who know from personal experience, at first hand, what "Communism" really means and to hear him describe it in detail (as we have heard him on two occasions) is a stirring experience. With the personal knowledge and experience with the facts in the background of his sermon, after expressing his appreciation of the "much needed and most valuable service for this nation" rendered by the Dean, he comments on parts of the Dean's approach to the subject and, in so doing, presents powerful spiritual reasons why Americans should waive their privilege, state the facts and take the consequences. Accordingly we print the sermon in full and follow it with editorial comments on certain aspects of the problem which appear to have been overlooked, not only by him, but by others.

F.W.G.

THE SERMON

Ever since 1653, ministers preaching from this pulpit have devoted themselves to that primary privilege of the religious man expressed in the 119th Psalm: "I will delight myself in thy statutes." They were just as cognizant, however, of the necessity of the succeeding petition of the same Psalm: "Open thou mine eyes that I may behold wondrous things out of thy law." In other words, a

minister's task and privilege was and is not only the contemplation of God's law, but also the study of the consequences of that law.

President Eisenhower's press conference statement of a few days ago put this task and privilege before every Christian person: there are vital foreign and domestic problems confronting the nation which "deserve the undivided and incessant attention of a Congress, of the executive branch, . . . of our schools, and even of our churches."

Now, as these things often happen, almost on the same day some kind members of our parish gave a full-page clipping of the *Christian Science Monitor* to the minister. The clipping contained a partial text of a speech delivered by the Dean of Harvard Law School at the winter meeting of the Massachusetts Bar Association. Even in its partial presentation, the speech claims our attention because of its lucid and precise style, because of its subject, which is the Fifth Amendment and the invocation of it by so many witnesses before Congressional investigating committees, especially and because of its approach to this important and controversial problem. We take the liberty of suggesting that especially by this approach, the illustrious Dean has performed a much needed and most valuable service for this nation. The Dean undertook to "review the Fifth Amendment" "in human experience," and it is this approach through human experience, that we believe has been so sorely needed for such a long time. Until now, there were, generally speaking, two extreme approaches to this problem. One group usually argued from the standpoint of the "avant garde" intellectual turned legalistic. They reminded some of us of Sinclair Lewis's complaint: "Our American professors like their literature clear and cold and pure and very dead." The other group looked upon this problem from a purely political angle. Many of us felt that the warning of the Gospel: "the Sabbath was made for man, and not man for the Sabbath," and "What shall it profit a man, if he shall gain the whole world, and lose his own soul?" should be heeded by one or the other group or both. The Dean's approach, through human experience, is the one, we believe, that is "well pleasing" to God and sorely needed by this nation.

While deeply grateful, however, to the Dean for offering us this new approach, the present speaker in all humility feels that additional data to the human experience through which the Dean reviewed the Fifth Amendment, could and should be quoted.

"The human experience" is demonstrated in this speech by two "sets of facts," which "are not the facts of any specific case." The Dean is "simply putting a hypothetical case" before us. Of the two sets of facts, the first refers to a Communist Party member who, after about ten years in the Party, "slowly drifted away from the group." At some Congressional Committee hearing he invokes the Fifth Amendment and refuses to answer whether he is or ever was a member of the Communist Party. He likewise refuses to answer

questions about others he knew in the Party. The Dean proceeds to "explain" the reasons for this attitude.

The man is "a college teacher" and "a good teacher" at that, a professor. "He is an idealist." "He has a great urge for what he regards as social reform." "He abhors anything involving force and violence." "One of the reasons that led him to join" was because he regarded fascism as highly immoral and a great danger to the world, and he "felt that the Communists were fighting fascism in Spain at this time."

The Dean repeatedly admits that "this is all very unlikely," that the description does "not correspond with any case you ever heard of," but he insists that he "should be able to assume any hypothetical case" he wants to because it "is one of the ancient rights of any law teacher."

Not being law teachers ourselves, we cannot claim to know the limits of this "ancient right." The average reader, or hearer, however, with a normal intelligence, must ask himself, and the Dean, this perfectly obvious question: Just how far can you stretch assuming and still remain connected with terra firma, or, in other words, just how hypothetical can a "hypothetical case" be to remain useful for the "review of the Fifth Amendment in human experience"? Your preacher remembers the Homeric Analogy, from his college years, an analogy in which the compared subjects were similar in one single point only, all other details being entirely different. It seems hard to find even a Homeric Analogy between this hypothetical case and reality, however. The Dean himself realizes the unreality of this "human experience." He admits it in three or four places, saying: "You may think that both of the sets of facts are unlikely, and that they do not correspond with any case you have ever heard of," and again: "You may feel that such a man must have been very naive or lacking in experience," etc. He insists, however, that our judgment rests on "the use of a large amount of hindsight," and that the professor "may have been naive or obtuse."

Analyzing the first of these two excuses, one wonders just how large an amount of hindsight obscures our understanding of the professor's reasons for joining the Communist Party. For the sake of bringing some measure of reality into this hypothetical picture, let us place ourselves in the professor's shoes *at the time* he joined the Party. The date must be somewhere between 1936 and 1939, the years of the Spanish Civil War, since the Communists' fighting Franco was one of his main reasons for joining. What information was available to the professor at that time about the Communists? The answer is obvious: an overwhelming amount of bloody, treacherous, horribly sickening, inhuman details. Yet the professor joined the Party. How does that fit into the hypothetical picture which is drawn about him?

1. The professor "abhors anything involving force and violence," yet he joins the Communist Party which in Russia, though a small

minority, forced itself into power through trickery and the bayonets of the Red Guard; continued to rule through a more ruthless terror than even that unfortunate country has even known. The elimination of the "Cadets," the middle class but democratic representatives, the butchering of the Kronstadt sailors, the "liquidation as a class" of the Kulaks, of the Nepmen, and millions of "class-aliens" was all reported year after year, even by Party news organs. Yet our professor, who "abhorred anything involving force and violence," did not hesitate to join the Communist Party.

2. The professor was an "idealist" and had a great urge for social reform. But, by the time of the Spanish Civil War, not only the "Capitalists" but also the Socialists, nay the Bolsheviks themselves became subjects of an endless series of victimization by the Party. The purges of "deviationists" alone should have awakened the "idealism" and social justice of our professor. The elimination of old Bolsheviks, like Zinoviev, Kamenev, Radek, etc., even if we do not want to mention Trotzky and his unmasking of the Moscow Party, could have warned the professor. Add to these the "Corrective Labor Camps," the GPU, the Kremlin Hospital, and the persecution of children for their "class origin." Just what do idealism and social reform mean if these examples were not strong enough to keep the professor away from the Party!

3. Having no time for other details, let us take now the professor's reasoning about the Communists fighting Nazism. All the press agencies, even the Tass, reported that Stalin renewed the Treaty of Rapallo with Hitler, adding commercial and trade pacts, and finally, in August, 1939, the infamous Pact of Non-aggression to it. During the Spanish Civil War, the Communist groups seemed to have been interested, not in the defeat of Franco, but in the seizing of power. Even while Madrid was besieged by Franco, the Communists turned against the Popular Front in a "Putsch," thereby making the defense of the capital impossible. The Communists were not fighting Nazism, they were fighting for power, and in this fight they were allies of the Nazis against the democratic free world up till the time Hitler attacked Russia in 1941.

All these facts, let us repeat, are not elements of "hindsight," they were amply reported and available to anyone who could read or listen to the radio. One is almost tempted to suggest that our professor must have been deaf or blind, if he did not read or hear these discouraging facts about the Communists. But, then, by saying so, we would insult the intelligence of the Helen Kellers who never joined the Communist Party.

The second defense, that our professor was "naive and obtuse," would be frightening if true. Just what "naive and obtuse" people teach the children of this country if among them our hypothetical professor was "a good teacher." Fortunately it is not so. This defense does not hold an atom of truth in it. The great and highly competent body of American teachers, the best in the world today,

is not "naive" nor "obtuse." Neither have they, the overwhelming majority of them, joined the Communist Party. When any teacher did join it, as indeed there is no occupational group which did not have one or two Communists, he did it, not through ignorance, but because he was a social revolutionary; not because he was an idealist, abhorring anything that involves force or violence, but because he was an intellectual theoretician for whom the end justified the means, and not as if he believed the myth that the Communists were fighting Nazism, as, indeed, he tried to keep this country from fighting Nazism until Hitler's attack on Russia ("The Yanks are not coming"), and became a supporter of the war against the Nazis only when the "Mother Party" in the Kremlin was threatened. This speaker, your minister, had the doubtful fortune of meeting hundreds of Communist intellectuals, both in this country and in Europe, under revealing circumstances, as comrades-in-arms (in the underground resistance movement) and as colleagues, members of parliament, where your speaker was head of the only opposition party against a Communist-dominated Coalition—yet, in all sincerity, he has never seen any among them who were not revolutionaries, theoreticians for whom individual human life and suffering meant nothing, and party fanatics who changed their sympathies and antipathies overnight following slavishly the latest party line. The idealist, violence abhorring, social reformer, anti-Nazi professor of this hypothetical case seems so far removed from reality that its usefulness for the "review of the Fifth Amendment through human experience" appears less and less valuable as we look deeper and deeper into the case. For the hypothetical professor, after having been Party member for about ten years, finally got disillusioned and "slowly drifted away" from the Party after the war. Why he got disillusioned is not adequately described; surely he had no more reason to leave the Party in 1945 or 1946 than he had for not joining it in 1936-39. During the war Russia was not only our "Noble and victorious Ally," but also gave evidence of settling down when it dissolved the Comintern, made peace with the Greek Orthodox Church, took part in international agreements, and restrained itself—at least, it pretended to—from major violences. The way our professor left the Party is even more improbable, though. He "slowly drifted away" from the Party. To anyone who has any knowledge of the discipline enforced in the Party, this slowly "drifting away" sounds as impossible as the slowly drifting away from a blackmailer, or from quicksand, or from the hangman's noose. Our professor's name, data and vulnerable points must have been on file from Boston to Moscow in a hierarchically widening sphere of jurisdiction. Even if—an impossible "if" in itself—but, even if the local "Cadre" allowed him to slowly drift away, the district, country, sphere, and global organizations would still carry his data, always waiting for the time when he could be threatened, bludgeoned or cajoled into party discipline again. Only those who believe (as a *Boston Herald* "Letter to the Editor" stated even a few days ago)

that the Communist Party is just like any other political party, could believe in this "slowly drifting away" business. Of course, to say that "the Communist Party is just like any other political party" is equal to saying that Jack the Ripper was just like any "other" surgeon. In the reality, no one can slowly drift away; you are either kicked out by the Party, or you sever your connections publicly. And the best protection against the nefarious intrigues of the Party is publicity. They seldom hurt a deserter if he is known as such by the general public. It would not be good propaganda for them. The professor, therefore, for sheer self-preservation, if for nothing else, should willingly answer YES to any inquiry about his Communist affiliations. Nothing American law or public opinion is able to do to him can be compared to the "disciplinary methods" of the Communist Party.

II.

The Dean quotes Mr. Justice Stephen J. Field's words about the Fifth Amendment. It is the "result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the state on the other." This 58-year-old quotation, uttered when there was no Communist Imperialism threatening us, is full of "magic" words. "The spirit of individual liberty" on the one hand, are all words of "good magic," the "collective power of the state," are words of "bad magic." Hearing it, we are all ready to rush to the defense of the "spirit" of the "individual," of "liberty," as against anything that is "collective," or "power" or "state." Yet, just what do we mean by "the collective power of the state" in our case? We are not speaking of a totalitarian state which the words unconsciously suggest today. We are not citizens of either Stalin or Hitler or Mussolini's monolithic state, neither are the Congressional Committees, against which we are so willing to defend the professor's "spirit of individual liberty." (A spirit, by the way, of which he did not seem to be so jealously proud when he joined the most authoritarian organization of the world, the Communist Party, which deprives everyone of both individuality, liberty and spirit.) The Congressional Committees represent the United States of America—in case we forgot it in the meanwhile—a government of, by and for the people. Every single member of this government gets elected and consequently is dependent on the votes of a citizenry which not only preaches but practices that "spirit of individual liberty" to a far greater degree than some of our intellectuals seem to give credit for recently. The "collective power of the state" is an abstraction in this country. The reality is: senators, congressmen, even the President, wisely conscious of a citizenry which not only makes or breaks them through its votes, but also keeps them under constant supervision and corrective vigilance. Naturally, people can be misled even in this country, but not for long. As Lincoln said rightly: "It is true that you may fool all the people some of the time;

you can even fool some of the people all of the time; but you can't fool all of the people all the time." And the people certainly do not like to be fooled, any of them, at any time. Therefore, they watch their representatives and vote them in and out of power quicker than they could learn the tricks of the "collective power of the state." It is impossible to talk about the state in this country and not see in it, behind it, all around it, a hundred sixty million Americans—human beings, individuals, men, women and children, who are not only fellow citizens but also fellow creatures, "neighbors" in the vocabulary of Jesus Christ. If our hypothetical professor would have to answer only "the collective power of the state," we would willingly leave him with his non-cooperation under the Fifth Amendment. When, however, we realize that he is not questioned by the henchmen of Stalin or Hitler or Mussolini, neither by the inquisitors of an impersonal but tyrannical "STATE," but by the legally elected representatives of a hundred sixty million human beings, Americans and neighbors—one has to ask the question: Just how will the professor's unwillingness to tell the truth about his and his friends' affiliation with the Communist Party affect the fate, the future, the well-being, nay, the very existence of his countrymen, fellow citizens and neighbors.

The professor declines to say anything about his or his associates' Communist affiliation because "he is convinced that neither he nor his associates have in fact done anything wrong." "Our teacher never engaged in espionage or sabotage or anything like that, and never saw or heard of any such activities by any member of his group," says the Dean. A remarkable Communist Party it must have been, one has to admit. No one, whether a former Communist like Whittaker Chambers or Herbert Philbrick, or anyone who had any chance of associating with them has ever heard of such a group of Communists. One wonders what that group did all during those eventful years. For even if they did nothing but read up on Marxism, Leninism, Stalinism, or studied the history of Communist Parties in any country, or enjoyed the editorials of the Communist newspapers and magazines, our professor must have seen and heard of such activities and the obligation of all party members to perform them in the interest of the Party and against the "exploiting Capitalist states." Let us accept, however, the unacceptable, and let us assume that our professor himself never did anything against the interests of the United States of America—how can he be so sure, even then, that none of his associates did either! He arrogates the knowledge which even J. Edgar Hoover, with all his experience, with all his FBI apparatus and detectives at his service, would not dare to assume without investigating the activities of each person in detail. A feat clearly impossible for our professor. Yet he declines to say anything about his associates' Communist affiliation.

Now, how does that affect the fate of his fellow citizens and neighbors? The professor must be acquainted with the modern

methods of crime detection. Most people are, because we read about it, hear about it constantly. He knows that crime detection is very similar to a jigsaw puzzle. An enormous number of data, persons, files, etc., have to be collected and examined before a clue or the criminal can be found. How does that apply to the professor's invoking the Fifth Amendment? Simply. By naming his associates, he might help the authorities to uncover or keep under surveillance a group which otherwise might endanger public or even national safety. Refusing testimony about his former Communist associates, our professor is really depriving the proper authorities of putting their jigsaw puzzle together. The professor's testimony might give the missing pieces to the authorities to complete the picture. It is not the professor, it is the experts, who are able to tell what information is valuable and what is not

Our professor could be put into the picture of a kidnapping case. Let us hypothetize that he joined, not the Communist Party, but a group of happy-go-lucky people, with whom he spent delightful evenings, but from whom he "slowly drifted away" after a while. Now let us also suppose that a child is kidnapped and the authorities are trying to find the kidnappers. They do not know who the kidnappers are, but they try to follow up every lead, among them a tip given them about certain members of the happy-go-lucky group to which the professor used to belong. So they go to the professor and ask him who those associates were. What will the professor do? He knows that he himself did not kidnap the child. He also feels reasonably certain that the others, his former associates, had not either. Yet, there is always a possibility, men are fallible. And he knows that the parents of the child go through the torment of anguish and uncertainty day after day, night after night. What will the professor do?

Or let us suppose that the same group is suspected of indulging in dope peddling and the professor is asked for information. He may not sell dope himself, and he may not have seen any of his associates sell dope either. But again, will he sit back in self-justification and refuse any answer, or will he think of the teen-agers or college students whose lives are being ruined systematically by these "merchants of death"?

The Fifth Amendment is one thing, and God's Law is another. "Love thy neighbor as thyself" that Law tells us. That means that we should love our neighbor and care for his well-being at least as much as we love ourselves and care for our own well-being. It also means that we should *not* place self-love and self-interest above the love and interest of our neighbors. And you know who He was who said: "Whosoever shall offend one of these little ones, it is better for him that a millstone were hanged about his neck, and cast into the sea." He has already hurt the interest of many "little ones" by joining the Communist Party and thereby giving an example to his students who so easily follow their teachers in intellectual gestures.

Even if he succeeded (which we doubt) in slowly drifting away from the Party, could his student-followers do the same? If we want to answer this in the affirmative, we have to believe that the C.P. is a harmless organization like the local Philatelist Society or the Noble Order of Bird Watchers. Only God and the professor's conscience could tell how many young men or women fell prey to the Party because of his example.

And now, on top of it, he refuses to help in giving information which he would give, without hesitation—we trust—if kidnapping or dope peddling were the issues. Or are these examples far-fetched? Hardly. From the more publicized peacetime kidnapping of General Koutiepov and Miller in Paris, France, to the practically everyday kidnapping in Vienna, Berlin, and elsewhere in our days, the Kremlin and the local Communist Parties show an unbroken and horrible series of abduction. The use of dope for the break-down of "Capitalist morale" is often mentioned among the objectives of the cold war. And of course, the very teachings of Marxism-Leninism-Stalinism are at least as dangerous as dope-taking for the victimized millions.

And there is, of course, that problem of the atom spies. For all our professor knows, some Soviet-beguiled scientist might be collecting data or even might be passing information at the very moment endangering the lives of millions of innocent civilians. This usual answer, given by "progressives," is that Russia does not need spies to develop her own atomic or thermo-nuclear weapons. That her own scientists can produce the same lethal weapons that ours can, sooner or later. On that "sooner or later," however, might depend upon whether Russia will be willing to come to some agreement in atomic warfare. To be sure, Russia spent more money and put on this job of atomic spying more men than on any other "project" outside of her own boundaries. The "twelve (now more) wicked men in the Kremlin," to quite Sir Winston Churchill, do not spend money and energy on useless and needless undertakings. To dramatize the issue, a Soviet Schnorkel submarine might be speeding toward one of our harbors this very minute for a sneak attack, for a new and much more horrible "Pearl Harbor" than the original was. Is this dramatization far-fetched? FBI Chief J. Edgar Hoover did not seem to think so, when he warned the country against atomic smugglers recently. Our professor shoulders an awful responsibility when he keeps back information about his former comrades. The "jig-saw puzzle" nature of crime-detecting might enable the authorities to stop atomic spying, or at least the smuggling of valuable data out of this country, with possibly just the information the professor might have given, even if he was so very "certain" that no one of his former associates has committed any crime.

Finally, there is that almost forgotten and, by certain progressive circles, much sneered at idea of patriotism. Is our professor a good

patriot, a good American patriot, when he refuses information that might help his country in this "Time of troubles" (Toynbee)?

Patriotism has little appeal to many because they imagine this country so powerful and invulnerable that the supreme effort of her citizens to protect her—what patriotism ultimately means—seems to be totally unneccessary. This country is powerful, thanks be to Providence and to the work and efforts of many preceding generations for it; but no power is invulnerable, and no country, except God's. Yet, with the best intentions probably, this power is the theme song even of teenager contest orators, as we saw it on TV recently. "I love America," they say, because she is so rich in natural resource, in financial goods, in technical "know-how," in man-power, in practically everything. This is all true and it is good if our teenager orators know it. Yet, human psychology works strange tricks, produces unexpected results. Logically, all that power, all that strength and richness should produce loyal citizens. But this is the same logic that attributes Communism to poverty alone. In the reality, power, wealth, strength seldom produce loyalty. Children of wealthy, or powerful and famous persons usually desert their parents, or revolt against them in one way or another. The unconcern of many Americans, the glib assurance that "It cannot happen here!" the cold identification of this country with "the collective power of the state," and the cynical invocation of the Fifth Amendment by those whose privilege it should be to help and defend the nation and the spirit which produced that Fifth Amendment, all these are typical examples of an entirely mistaken conception of what America and her place on this troubled earth really mean.

Yes, America is powerful, and rich, and strong, but she is also lonely, surrounded by an envious and predatory world. This loneliness is, of course, partly due to her power, wealth and strength, which the rest of the world envies or fears. The main reason for America's loneliness, however, is deeper and more dangerous, for it is psychological. Walt Whitman, in a preface to his *Leaves of Grass*, talked about this problem, and said that "The genius of the United States is most evident in the common people. Their . . . aversion to anything indecorous or soft or mean . . . their self-esteem and wonderful sympathy." After a century, the "common people" are the "people" of this country today, the nation. And the American approach to basic problems of life and history are just as direct and human and lofty and sincere as then. Let us not name this approach "idealistic," certainly not in this address which saw that word applied to our hypothetical professor. Americans are not "naive and obtuse" like the "idealistic" professor. Some of the sharpest business "transactions," cleverest political "deals," most astute "purchases" and non-sentimental "occupations" were and are being practiced by Americans. But the *basic problems* of life and history Americans approach with the optimism, simplicity, magnanimousness and "wonderful sympathy" of a child or a prophet. Remember Thomas

Woodrow Wilson, who took this country into World War I "to make the world safe for democracy," and believed that he could persuade David Lloyd George, the "Welsh Fox" and Georges Clemenceau, the "Tiger" of France, to make a "peace without victory" and establish a League of Nations for perpetual peace? Remember Franklin Delano Roosevelt who told William C. Bullitt: "I just have a hunch . . . that if I give him [Stalin] everything I possibly can and ask nothing from him in return, noblesse oblige, he . . . will work with me for a world of democracy and peace"? The Fox and the Tiger were annoyed by the "amateurishness" of Wilson, Stalin roared in laughter about the "gullibility" of Roosevelt, all three took shameful advantage of the "American approach," and both presidents became broken men, soon to die, because of their "dire disillusionment." We, too, may and do grumble about the political wisdom and timing of these attempts to bring about peace and democracy for the world, but in our heart of hearts both Wilson and Roosevelt stand infinitely nearer to us than all the Foxes and Tigers and Stalins of human history. And when—soon, we hope—an effective international instrument of peace and democracy will be established to benefit mankind, we know that it will be achieved on the line these "gullible" American "amateurs" attempted and not through the trickery of those past-masters of international intrigue.

In the meanwhile, the "American approach" is scorned, laughed at and hated by the world. America is lonely. Lonely in her power, in her wealth, in her strength, but especially and particularly lonely because of her belief that peace, justice, democracy can be achieved through a simple, direct, "wonderful sympathy" of a child or of a prophet.

Therefore, let us say, "I love America," as children love their lonely mother, whose trust and love and cleanness of mind makes her an easy prey to the worldly wise. "I love America" with the devotion and self-sacrifice which only anguished, protective, even desperate, love can produce. "I love America" at least as much as myself, my real self, which is the Spirit of God in me. And should it be required of me, I shall be glad to give up my comfort, my wealth, even my life, to protect her, this last ray of hope in the ever-darkening world, without which life is sheer existence, political and economic slavery, brutal and aimless suffering!

Invoke the Fifth Amendment when her safety needs by answers, and I most probably reverse the very reason for which it has been passed. My refusal to give information will help a "collective power of the state" (Russia), and will destroy the "spirit of individual liberty"—who knows—for how long!

All laws of men, even the Fifth Amendment, can be misused and abused by clever and unscrupulous schemers. Follow the Law of God and be not afraid of misuse and abuse, for the Law of God is not letter but spirit, and its upholder is the God of Justice and Peace Himself.

EDITORIAL COMMENT AND THE 12TH ARTICLE OF THE MASSACHUSETTS BILL OF RIGHTS

Having listened to Dr. Ivanyi on two occasions, we say, with emphasis, that anything he says deserves respectful consideration. We appreciate the force of his spiritual advice to individuals facing suspicious authority. His advice is timely and pertinent. But we are considering a constitutional provision for the protection of a "lonely" individual against suspicion and very possibly arbitrary officials—and there are such persons even in America. This provision was thought out for us by informed practical idealistic 18th century thinkers—as profoundly thoughtful in their idealism as any one alive today.

Dr. Ivanyi criticizes the Dean's use of an "unlikely" "hypothetical case". Well, we will be more definite than the Dean. As a result of pretty close observation of human beings for more than half a century we say without the slightest hesitation that the Dean's "hypothetical case" is not at all "unlikely" and is a very accurate suggestion of the varied ways in which men can and do make fools of themselves. If you ask, as Dr. Ivanyi appears to, "how foolish can man be?" we submit that there never has been and never will be any limit whatever. Making some kind of a fool of himself is part of the lot of all men individually and collectively, including Americans, although they may not like to admit it.

Dr. Ivanyi proceeds:

> "The Dean quotes Mr. Justice Stephen J. Field's words about the Fifth Amendment. It is the 'result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the state on the other.' This 58-year-old quotation, uttered when there was no Communist Imperialism threatening us, is full of 'magic' words. 'The spirit of individual liberty' on the one hand, are all words of 'good magic', the 'collective power of the state', are words of 'bad magic'. Hearing it, we are all ready to rush to the defense of the 'spirit' of the 'individual', of 'liberty', as against anything that is 'collective', or 'power' of 'state'. Yet, just what do we mean by 'the collective power of the state' in our case? We are not speaking of a totalitarian state which the words unconsciously suggest today. We are not citizens of either Stalin or Hitler or Mussolini's monolithic state, neither are the Congressional Committee, against which we are so willing to defend the professor's 'spirit of individual liberty.' (A spirit, by the way, of which he did not seem to be so jealously proud when he joined the most authoritarian organization of the world, the Communist Party, which deprives everyone of both individuality, liberty and spirit.) The Congressional Committees represent the United States of America—in case we forgot it in the meanwhile

—a government of, by and for the people. Every single member of this government gets elected and consequently is dependent on the votes of a citizenry which not only preaches but practices that 'spirit of individual liberty' to a far greater degree than some of our intellectuals seem to give credit for recently. The 'collective power of the state' is an abstraction in this country. The reality is: senators, congressmen, even the President, wisely conscious of a citizenry which not only makes or breaks them through its votes, but also keeps them under constant supervision and corrective vigilance. Naturally, people can be misled even in this country but not for long. And the people certainly do not like to be fooled, any of them, at any time. Therefore, they watch their representatives and vote them in and out of power quicker than they could learn the tricks of the 'collective power of the state'. It is impossible to talk about the state in this country and not see in it, behind it, all around it, a hundred sixty million Americans—human beings, individuals, men, women, and children, who are not only fellow citizens but also fellow creatures, 'neighbors' in the vocabulary of Jesus Christ. If our hypothetical professor would have to answer only 'the collective power of the state', we would willingly leave him with his non-cooperation under the Fifth Amendment. When, however, we realize that he is not questioned by the henchmen of Stalin, of Hitler or Mussolini, neither by the inquisitors of an impersonal but tyrannical 'STATE', but by the legally elected representatives of a hundred sixty million human beings, Americans and neighbors—one has to ask the question: Just how will the professor's unwillingness to tell the truth about his and his friends' affiliation with the Communist Party affect the fate, the future, the well being, nay, the very existence of his countrymen, fellow citizens and neighbors".

This is American enthusiasm and we respect it, but we cannot accept it as a picture of human nature in America as seen by the "Founding Fathers", or as presented to us today in many ways by Americans. What were the "Founding Fathers" thinking about? They knew that when they got rid of King George III after the American Revolution, they had a new king called "the people" which, for practical purposes, is King Voting Majority—not of all the people—but of those people who are not too "bored" or busy or lazy to vote. Most of the 18th century Americans were religious people but they knew that the Ten Commandments and the Sermon on the Mount had not proved sufficient as practical instruments of government—that they needed something like Magna Carta and we have pointed out repeatedly, the words of Thomas Allen and his fellow "Berkshire Constitutionalists":

"Every man by nature has the seeds of tyranny deeply implanted within him so that nothing short of Omnipotence can eradicate them. . .

"That knowing the strong bias of human nature to tyranny and despotism, we have nothing else in view but to provide for posterity against the wanton exercise of power, which cannot otherwise be done than by the formation of a fundamental constitution."

"Let it not be said by future posterity [which means us today and our 'posterity'] that we made no provision against tyranny among ourselves."

Dr. Ivanyi refers to the quotation from Mr. Justice Field as a "58-year-old quotation." Surely, he cannot mean that a quotation is any less important because it is 58 years old. We cannot understand history unless we bear in mind Robert Browning's line "God's instant men call years." Mr. Justice Field, whatever his faults, and he had them like the rest of us, not only had exceptional experience of men, beginning in mining camps of California but he was also a legal scholar and knew what he was saying about "individual liberty" and "the state". Dean Griswold's account of that struggle is correct and if any one wants to follow it up with a little reading, we recommend the two chapters on "Magistrates and Judges" and "Criminal Procedure" in John Pollock's vivid book "The Popish Plot" during the reign of the Stuarts in 17the century England. "When the fourteen men who died for the Popish Plot were brought to the bar" there were none of our modern protections of the rights of individuals against "the State" assisted by the most famous liar in English legal history—Titus Oates. The treatment of Lord Stafford, eighty years old and feeble—one of the fourteen men—is a lesson in itself. As Professor McLaughlin said, "You cannot in discussion of American history, lose sight of the seventeenth century," and our Constitutional safeguards emerged from 17th century England three hundred years before Hitler, Stalin and Mussolini appeared on the scene.

Dr. Ivanyi says "the collective power of the state" is an abstraction in this country." We, respectfully, challenge that statement. What is "the state"? We have one in America as all nations have. Ours is more restrained than others, but within these restraints, and at times in spite of them.

"The seduction of power is just as masterful over a democratic faction as ever it was over king or barons. In former days it often happened that 'The State' was a barber, a fiddler, or a bad woman. In our day it often happens 'The State' is a little functionary on whom a big functionary is forced to depend."*

As to the "hundred and sixty million Americans" and their elected representatives and their "constant supervision and corrective vigilance", why is it that fifty percent or more habitually neglect the exercise of their "glorious heritage" of their right to vote? We think the answer is to be found in a sentence of the late Dean Inge: "The influence of boredom on history is very much underestimated."

Americans and their elected representatives are also subject at

* William G. Summer in "The Forgotten Man's Almanac."

times to waves of hysteria, prejudice and even vengeance. We are still paying the misunderstanding price of the stupid, vengeful "reconstruction policy" of a headstrong power-intoxicated Congress of elected representatives, which "ground its heel" on the prostrate South after "the war between the states", under the lead of Thaddeus Stevens and other professed saints and political sinners, including some from Massachusetts, who came near wrecking the Government of the United States (See A.B.A. Journal, Jan. 1954)

The "collective power of the State" is not an "abstraction" in America. It is just as real and, as John Adams said, potentially just as arbitrary and gradually "totalitarian" through its agents, if the restraints are ignored, as any other "state" with absolute power. In this respect our government, which is all of us, is built on the same foundation as that of individual character—reasonable restraints. Without them, governments, like individuals, can, and do, go to pieces sooner or later.*

Returning now to the Fifth Amendment, it provides that no person "shall be compelled in any criminal case to be a witness against himself."

It seems generally forgotten, even by members of the Bar, that the 12th Article of the Massachusetts Bill of Rights of 1780, adopted for the same purpose eight years before the Fifth Amendment, is more specifically explanatory. It provides that no one shall be "compelled to accuse, *or furnish evidence against himself.*"

What have the courts, especially in Massachusetts, said about the meaning of this?

First, in 1871, in Emery's Case (107 Mass. 172, at pp. 183-4) Mr. Justice Wells, for a unanimous court, decided that the prohibition applied to a legislative investigating committee and discharged a man convicted by the Senate for contempt in claiming his right to refuse to answer. The court said

> "There is nothing in the terms of the article—to except legislative bodies from its operation. The nature and purpose of the provisions are equally applicable to investigations conducted by the legislature itself, or by one of its branches, or by a committee of its own members, as when conducted before the courts, or by commissioners, or other tribunals established by law. Such tribunals can in no case disregard this rule of protection. The legislature cannot, by the most formal and solemn enactments of law, authorize them to do it . . .
>
> "If other means of discovering offences and convicting offenders are thought to be inefficient or unsatisfactory, investigations by direct authority of the legislature, prompted by public complaints, and intended primarily to furnish information upon which that body may act in remedying abuses in the administration of public affairs, may easily be perverted into an effective means of procuring material to aid in the institution and maintenance of criminal prosecutions. Committees of the legislature, or commissioners

*There is an old Persian proverb—"Three major calamities—fire, flood and officials".

acting under its order, to inquire into any supposed failure to enforce the laws, if freed from the restrictions of the Constitution in this particular, may be found useful and efficient as auxiliaries of the grand juries of the Commonwealth. In this way, parties exposed to prosecutions would find their constitutional protection to have failed them. It is the capability of abuse, and not the probability of it, which is to be regarded in judging of the reasons which lie at the foundation, and guide in the interpretation of such constitutional restrictions.

"It is argued by the attorney general, that the article in question is merely the adoption of a rule which prevailed at the common law; that, along with that rule, there always existed in the parliament of England a practice to disregard it in investigations pertaining to the business of that body; and that the rule of legislative investigation remains, unaffected by the constitutional article.

"But the rule of the common law did not control parliamentary inquiries, for the simple and obvious reason that the authority of parliament was more potent than the common law, and might change, annul or suspend its restrictions, as that body should determine. The exception is not confined to investigations relating to the business of parliament, but extends to all those in which it authorizes a disregard of the common law rule, before whatever tribunal they are authorized to be conducted. It is because the Constitution of Massachusetts is more potent and above, not only the common law, but the legislature also; controlling all tribunals and all departments of the government alike, as well as all inhabitants of the Commonwealth; that this safeguard of individual rights cannot be suspended or invaded, either by general laws, or the special order of the legislative body, or of any of its branches."

Second. In the same case (p. 182) the court said:

"Upon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetuated, or even the *corpus delicti* itself.

Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved, in subsequent

prosecutions, as admissions of facts sought to be established therein."

In 1942, in Commonwealth v. Prince (313 Mass. 223), the unanimous court, in an opinion by Mr. Justice (now Chief Justice) Qua, held that the defendant could not be asked the name of her minor niece who was with her at the time of the alleged offence. After quoting from the Emery Case, the court said:

"Plainly her conviction on the first complaint was based solely upon her refusal to disclose Betty's name. It might be argued that Betty's name in itself had no tendency to incriminate the defendant, and was not an element of proof in the prosecution against her. On the other hand, the course of the evidence at the trial, including Betty's own testimony, made it clear that she was a witness who could, if the defendant were guilty, testify to every single element of proof necessary to convict the defendant on the second and third complaints . . . The supervisor of attendance was in effect asking the defendant to help him secure the Commonwealth's principal witness in order to prosecute the defendant. If the defendant can be convicted for not answering such a question, why could not a statute be enacted in effect requiring every person suspected of crime to furnish the police a list of all the witnesses whose testimony would convict him? We do not see how we can uphold the present conviction on the first complaint without overturning the construction of the Constitution given after careful consideration in Emery's Case. We are not ready to take that step.

Finally, in 1951, in Jones v. Commonwealth (327 Mass. 491) the unanimous court, in an opinion by Mr. Justice Spalding, reversed a contempt order of a District Court against a defendant who, while waiving his privilege by testifying at his trial for violating an ordinance, refused to answer "whether he was a Communist or a member of the Communist Party" saying:

"But we fail to see how the question asked by the judge was relevant to any matter in issue. The issue was whether the defendants had done that which the regulation forbade. Proof that the defendant was a Communist or a member of the Communist Party would have no bearing in establishing that fact.

"Under Article 12 of the Declaration of Rights the defendant could not be 'compelled to accuse, or furnish evidence against himself.' Thus as to those matters which were not relevant to the issue or proper for impeachment purposes the defendant was privileged from answering any question which would 'expose him to criminal prosecution, or tend to subject him to a penalty or forfeiture.' Bull v. Loveland, 10 Pick. 8, 14. In our opinion the disclosure called for by the judge's question would have violated that privilege. True, being a Communist or a member of the Communist Party is not a criminal offense in this Commonwealth, but, by revealing that he was either the defendant would

be *furnishing a link in a chain of evidence* which might expose him to a criminal prosecution under our statutes . . .

"We are of opinion that the reasoning underlying . . . decisions is sound and that it is applicable here. That an admission that one is a Communist may furnish a 'link in the chain of evidence' needed in prosecutions for conspiracy to violate a statute of the type of G.L. (Ter. Ed.) c.264, pp.11, as amended, is amply demonstrated by the cases of Wunne v. United States, 138 Fed. (2d) 137 (C.A. 8), certiorari denied 320 U.S. 790, applications for rehearing denied 320 U.S. 814, 815, Dennis v. United States, 341 U.S. 494, and United States v. Foster, 80 Fed. Sup. 479. The question asked by the judge called upon the defendant to furnish evidence which might reasonably have exposed him to a prosecution under G.L. (Ter.Ed.) c.264, pp.11, as amended, or, at least, might have substantially increased the danger of such a prosecution. Emery's Case, 107 Mass. 172, 181-182. Commonwealth v. Prince, 313 Mass. 223, 229-231. This cannot be done under our Constitution."

These carefully considered opinions establish the meaning of the 12th Article in Massachusetts and, presumably, of the Fifth Amendment in the Federal courts or Congressional investigations as the protective purpose of the provisions is the same.

As we see it, it all adds up about as follows.

The criminal law deals with an individual alone against organized society which means all of us good, bad or indifferent or our elected or appointed representatives or agents good, bad or indifferent. Under our Constitution an individual has the right to make his own kind of a fool of himself in one way or another and get over it, if he can, without telling about it. The "Founding Fathers" knew, and we know, as a matter of common sense, supplemented by observation or personal experience, that Americans exercised, and would, and still continue, to exercise, this right all the time in one way or another. In an imperfect world and with an imperfect government, however ideal in purpose, Americans have considered it fairer to recognize and protect a man's right to silence. With the American habit of multiplying crimes in every direction we know that it is often difficult not to commit some kind of criminal offense even if it be a minor one. The constitutional privilege of silence applies to all of them and the question whether to claim the privilege or not must be decided by the accused, or suspected person, *alone* with his own conscience whether he has legal advice or not.

Many Americans have vague ideas about law and government and cockeyed ideas about all kinds of facts including communism, even if they ought to know better. If you don't believe it, talk to people or consider how much you yourself really know about many things with which you are not familiar—atomic bombs or "flying saucers" for instance.

Now, without theorizing (for we know it can easily happen)

suppose an innocent man or one who has made a fool of himself, finds himself accused or suspected alone or with others under suspicious circumstances. He may have a family. He knows that he will be suspected if he claims his privilege and that he may be charged with the newfangled "guilt by association" or something, but he thinks, rightly or wrongly, that it may be worse for him and his family if he does not. He must decide the question alone and he claims it. Is there any reason why he should not try to protect himself and his family? Think it over. Suppose he is asked the names of his friends or associates, real or apparent. He has no legal right to claim the privilege to protect them, however altruistic he may feel, but he has a right not to "furnish evidence against himself" and he cannot know whether, if he gives their names, one or more of them may turn on him with perjured or mistaken or insinuating testimony so that, by revealing them he may forge a "chain" of "evidence against himself," however innocent or guilty or foolish he may have been. He has not heard Dr. Ivanyi, or any other informed person, preach about patriotism or talk about communism. He, like many Americans, may not know much about the history of his country. Is there any reason why he should not refuse to reveal the names of others *to protect himself?* He must decide that question himself *and alone* and take the consequences *either way.* Think it over.

Many of us seem to underestimate the prevalence and variety of human foolishness. It was for this reason that we quoted in full in the April issue, Sill's poem "The Fool's Prayer".

If each of us one hundred and sixty million Americans who make up the American king called "the people", would read and ponder that poem, things might be better.

"Earth bears no balsam for mistakes:
. . .: But Thou, O Lord,
Be merciful to me, a fool."
"The room was hushed; in silence rose
The King, and sought his gardens cool,
And walked apart, and murmured low,
'Be merciful to me, a fool'."

Until a substantial *and permanent* voting majority, of us, and our representatives and our investigators and bureaucratic agents, all do that, it seems that the Americans, in the interests of justice to the individual, will need and will keep our Constitutional Bill of Rights including the Fifth Amendment and the Massachusetts Twelfth Article, however they may be abused, as, of course, they can be, or however imperfectly they may work, to provide, as the Berkshire men said, "against tyranny among ourselves." Think it over. If all this seems like a legal sermon, so be it. Its purpose is not to counteract but to supplement Dr. Ivanyi's sermon relative to the nature and structure of our government and bring it into perspective. F.W.G.

NOTIFYING CRIMINAL DEFENDANTS OF THEIR RIGHTS

BY

HERBERT CHARLES FEINSTEIN

It is commonly assumed that every accused knows that he has a right to a lawyer. Such is not the case, however, for a number of people. The uneducated with little intelligence and less information, the foreign-born with scanty knowledge of our procedures or of our language, and others may come before the courts of Massachusetts friendless, afraid, and ignorant of their rights. Moreover, such information about legal rights on the part of a man may presuppose a certain amount of experience as a defendant. An innocent man, charged with his first offense, is less likely to possess courthouse acumen than his more practiced cellmate.

The District Court may commit a person found guilty to prison for several years, and a defendant who fails to appeal forthwith upon being found guilty loses forever his right of appeal.*

One, though innocent, who through ignorance or inadvertence, has pleaded guilty in the District Court may find that his sole basis of appeal is confined to the question of the length of sentence.

Thus it is possible for innocent and guilty alike to be tried and sentenced through procedures which, if not without due process of law, within the literal present construction of that phrase, are bereft of that dignity and respect to which we like to believe all human beings are entitled, no matter how misguided or unfortunate. To evidence the benefits which accrue to society from affording fair methods, Dean Erwin Griswold of the Harvard Law School recently has reminded us that "methods and procedures are of the essence of due process, and are of vital importance to liberty."

In Massachusetts, in crimes which are not capital offenses, even those punishable by life imprisonment, there is no right to a court-appointed counsel for indigents, whose bill the Commonwealth must pay. *Allen v. Commonwealth*, 324 Mass. 558, 87 N.E . 2d 192 (1949). However, in the *Allen* case the trial judge did inform the defendant of his right to counsel, even though the defendant was instructed the Commonwealth would not provide him with one. The trial court assisted Allen in conducting his defense, though Allen was found guilty by a jury and sentenced to prison for life. *Accord*: *Wilson v. Lanagan*, 99 F. 2d 544 (1st Cir. 1938), *cert. denied*, 306 U. S. 634 (1939).

It is the sad reality that the great danger lies in that most District Court abuses go unnoticed; that they rarely involve extreme punishments, since the majority of District Court cases comprise

*_Mariano_ v. _Judge of District Court_, 243 Mass. 90, 137 N. E. 369 (1922)
Renado v. _Lummus_, 205 Mass. 155, 91 N.E. 144 (1910)
Weiner v. _Wentworth_, 181 Mass. 15, 62 N.E. 992 (1902)

minor crimes, less newsworthy or dramatic than the homicide of the *Allen* case; that most errors never reach the light of day for correction; that it is more likely that an illiterate indigent may languish embittered in jail, without the ability to articulate his grievances, but festering within him a justifiable grudge against society.

Let us see how other jurisdictions have coped with this problem? Some, like California, and Connecticut have a Public Defender's office, whose job it is to defend persons accused of crime. The Public Defender may hold office through election or appointment, but, like his antagonist the District Attorney, the Defender is equipped with the authority of the law: he is also provided with a staff of counsel and a budget. Such practice, though expensive, recognizes that a social interest exists in the defense of persons accused of crime, as well as in their prosecution.

Other jurisdictions, like Illinois, have met this problem in a less formal way, seeking to give the matter publicity and thereby making judges, prosecutors, lawyers, and accused persons conscious of these fundamental legal rights. In Illinois the state bar has undertaken this responsibility. A pamphlet, "Your Rights When Arrested" has been prepared by the Committee on Civil Rights of the Illinois State Bar Association, and approved for publication by the Board of Governors of the Illinois State Bar Association. This pamphlet has been widely disseminated throughout the state bar. This brochure contains a brief digest of the rights of an accused when arrested, his rights when in jail, and his rights in court. Illinois seems to be advanced in so far as the right to counsel is concerned, for upon the filing by the accused of an oath, the court is obliged to provide him with counsel. An accused in Illinois receives the following comforting information:

> "You are entitled to be represented by a lawyer of your own choosing. You are also entitled to a reasonable time before the trial to obtain a lawyer. If you tell the court that you wish to be represented by a lawyer and state on your oath that you are unable to obtain one, the court must obtain a lawyer to defend you."

This is akin to the practice in certain European countries, such as the Netherlands, where every lawyer must serve without fees in a certain number of criminal cases assigned to him by the court. The attorney is said to do this work, *Pro Deo*.

However, we in Massachusetts need not resort to exotic forums for a solution to our problem. The District Court in Lowell for some time, on its own initiative, has used a printed form to advise defendants of their minimal constitutional rights, such as their right to counsel, the right to time for adequate preparation for trial, to summon witnesses for their defense, and to have the charges against them fully stated. A copy of this form is set out in a footnote.

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. District Court of Lowell

NOTICE TO ACCUSED

You are charged with an offence which is specifically described in a complaint which will be read to you by the Clerk and which you may examine if you so desire.

When you are brought before the Judge you will be asked by the Clerk whether you wish to plead GUILTY or NOT GUILTY to the offence.

1. You may plead guilty, if you wish to admit your guilt to the offence, OR you have the right to plead not guilty, in which case you will be given a trial and have the witnesses testify in your presence.
2. You have the right to have a lawyer of your own choosing, BUT AT YOUR OWN EXPENSE, to represent you, or you may try your own case yourself.
3. You have the right to have a reasonable time to prepare for your trial.
4. If you are convicted and sentenced you will have the right to appeal to the Superior Court, provided you appeal IMMEDIATELY after conviction and sentence by the Court. If you do not then appeal you will not have any further right of appeal.
5. If your offence is a felony and the Court finds probable cause against you, you will be held for the Superior Court where you will be given a trial.

BY THE COURT

A very helpful bill was filed in the General Court for 1954 to make this system mandatory on all the District Courts of the Commonwealth. However, this proposal has not been adopted but has been referred to the Judicial Council for study.

In the absence of legislative action, the Administrative Committee of the District Courts, provided for in *Massachusetts General Laws*, c. 218, Section 43 (a), has authority "to require uniform practice" and "to prescribe forms of blanks and records."

Either through legislation by the General Court or the action of the Administrative Committee, this form can be used, as a minimum procedural safeguard, by all the District Courts of the Commonwealth. These forms should be made available in all the police stations and jails in the Commonwealth and should be handed to every accused upon his detention or arrest, at the earliest possible opportunity.

If there is any reason to suspect an accused is illiterate, or cannot read English, then this form should be read aloud and explained to him. If there is the further question whether a person charged with an offense can grasp the meaning of his simple rights, there is doubtless also a question whether such a defective properly can be held legally to atone for his crimes.

The cost of printing such forms certainly should not be great. Every practicing lawyer can testify to the existence of a multitude of rarely used forms now gathering dust in the offices of all the Clerks of Court in the Commonwealth.

One may ask, what of the work of the Voluntary Defenders? Doesn't this private, Community Chest subsidized, group already accomplish the desired result by informing defendants in the jails of their rights? Within some very real limitations, the answer is yes, but not sufficiently. The first obvious limitation is geographical,

the Boston and Harvard Voluntary Defenders are obliged to restrict their fine work to certain Middlesex and Suffolk County jails. The need for the proposed procedures is state-wide. It is more likely in the big cities, with well populated jails, that one accused will tell another, that prisoners will appraise each other of their legal rights, though chances are that good advice will be commingled with a liberal quantity of error. Furthermore, the Voluntary Defenders are a private group, over which the Commonwealth has little control. The duty of informing defendants of their rights upon arrest would seem to devolve more appropriately upon the state itself.

In the second place, even in the Boston area, the proposal goes beyond the purview of the Voluntary Defenders, who take cases *after* these have been brought to their attention.* The accused must first *know* he has a right to counsel, one of the aims of the proposed reform. An appraisal of a typical card left at the Charles Street jail, for persons charged with offenses, will indicate the limited scope of this organization, and why it does not obviate the need for a general practice similar to that in the Lowell District Court above quoted.

**Card Front*

"If you need a lawyer

"If you are being held for the High or Superior Court

"If you have no funds to hire a lawyer and have no other way of securing such services

"You may talk to Mr. Hollingsworth of the Voluntary Defenders Committee by signing your name on this card and giving to any guard.

Name: Cell No.

....

"The Voluntary Defenders Committee does not represent anyone who has any way of securing a private lawyer.

"It does not represent anyone in the District or Lower Court cases but in such cases every defendant has a right to appeal any finding of guilty or any sentence imposed and can then ask to speak to one of our attorneys." (Emphasis supplied)

NOTE

The Lowell practice may be a matter for experiment in other district courts rather than by a general statute. Ed.

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NOTICE TO THE BAR FROM THE DIVISION OF EMPLOYMENT SECURITY

To Members of the Massachusetts Bar:

Your attention is directed to the General Laws of Massachusetts, Chapter 151A, Employment Security. (Annotated Laws of Massachusetts, Volume Four-A.)

"Sec. 37. Fees; Representation by Agent or Attorney; Penalty for Receiving Unauthorized Remuneration, Soliciting Business of Appearing for Claimant, etc.—No fee shall be charged in any proceeding under this chapter by the director for (or) any of his agents or representatives.

"In any proceeding under this chapter a party may be represented by an agent or attorney. No fees for the services rendered by such agent or attorney to an individual claiming benefits shall be allowable or payable unless the amount thereof shall have been previously approved by the director, except in proceedings arising under sections forty and forty-one when such fees shall be so approved by the board of review. Whoever exacts or receives any remuneration or gratuity for any services rendered on behalf of a benefit claimant under this chapter, except as authorized by this section, or who solicits the business of appearing on behalf of such a benefit claimant, or who makes it a business to solicit employment for another in connection with the making of any claim for benefits under this chapter, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months, or both. (1941, 685, Sec. 1, appvd. Oct. 24, 1941. Declared an emergency law.)"

The matter of amount of fees of attorneys, with respect to hearings before the Director or his representative under Sec. 39 of the Employment Security Law, was thoroughly discussed with representatives of various Bar Associations throughout the Commonwealth. It was decided that $15.00 would be a reasonable fee for preparation, conferences, and attendance at a hearing held under said Sec. 39. If an attorney is required to appear at a second hearing resulting from a continuance, an additional fee of $10.00 may be charged.

The above information is issued for your guidance.

DIVISION OF EMPLOYMENT SECURITY
DEWEY G. ARCHAMBAULT, *Director*

SOME NEW 1954 STATUTES

Chapter 439, Relative to Specific Performance:

"Section 1. Chapter 214 of the General Laws is hereby amended by inserting after section 1 the following section:—Section 1A. The fact that the plaintiff has a remedy at law for damages shall not bar a suit in equity for specific performance of a contract, other than one for purely personal services, if the court finds that no other existing remedy, or the damages recoverable thereby, is in fact the equivalent of the performance promised by the contract relief on by the plaintiff, and the court may order specific performance if it finds such remedy to be practicable. If performance is not decreed, damages may be determined in the proceeding, and if the defendant claims a jury on that issue, the issue shall be framed and referred for jury trial." (Takes effect September 1st.)

This act was recommended by the Judicial Council in its 27th Report in 1951 for reasons stated, pp. 9-13, and renewed in the 28th Report, p. 26, and in the 29th Report, p. 37.

Chapter 442: providing for the admissibility in evidence in criminal cases of entries in the course of business, in accordance with the provisions stated in the act. (Takes effect September 1st.) Recommended by the Judicial Council in its 29th Report for reasons stated, pp. 27-32.

Chapter 467: Regulating the Attachment of Wages.

This act clarifies the practice and was recommended by the Judicial Council in its 27th Report for reasons stated, pp. 13-15, renewed in the 28th Report, p. 16, and in the 29th Report, p. 12.

Chapter 487: Relative to Liens for Water rates and Charges. We understand that it was supported by the Committee of the Massachusetts Conveyancers Association.

Chapter 641: modifying and clarifying the Rule against Perpetuities. The original draft with explanatory notes was printed in the "Quarterly" for December 1953 (Vol. 38 No. 1). It was revised in the light of suggestions received. The act as passed with its history and revised explanatory notes will be printed in our next issue as the act does not take effect until January 1, 1955. The Harvard Law Review for June 1954 contains an article by Prof.

W. Barton Leach on the act, and the Boston University Law Review for April contains an article by Owen Tudor.

Chapter 528: providing for interlocutory reports of questions of law to the Supreme Judicial Court in Criminal Cases. (Declared an emergency act and now in effect.) Recommended by the Judicial Council in its 29th Report p. 36 where the history and reasons for it will be found.

Chapter 556: shifting the jurisdiction of reciprocal non-support cases from the Probate Courts to the District Courts. Recommended by the Judicial Council in its 29th Report pp. 16-22 for reasons there stated.

Chapter 616: Revival of the "Fielding" Act, recommended by the Judicial Council p. 9 and the Massachusetts and Boston Bar Associations. This act, originally adopted in 1934 and repealed in 1943, is re-enacted as a measure to reduce congestion in the Superior Court for reasons stated in the 29th Report. It provides that motor vehicle cases must be begun in a District Court with a right of removal.

TREASURER'S REPORT FOR 1953

January 1, 1953

Worcester County Trust Company, checking account	2,100.98	
Worcester County Institution for Savings	4,000.00	
Worcester Mechanics Savings Bank	4,000.00	
George R. Nutter Fund, 2 Series "G" U.S. Savings Bonds	1,500.00	
Law Society Scholarship Fund:		
Amount Invested	4,512.40	
Amount Uninvested	401.14	
Income on Investment	296.05	
Total Amount on Hand January 1, 1953		16,810.57

MEMBERSHIP RECEIPTS

1953 Senior Dues	25,545.00	
1953 Junior Dues	826.00	
1953 New Members Senior Dues	577.50	
1953 New Members Junior Dues	248.00	
1954 Senior Dues	127.50	
1954 Junior Dues	4.00	
1954 New Members Senior Dues	810.00	
1954 New Members Junior Dues	264.00	
Affiliated Association Dues	112.50	
Dues for 1952	423.00	
Advance Dues	14.00	
Total Membership Receipts		28,951.50

MISCELLANEOUS RECEIPTS

Worcester County Institution for Savings, dividends	120.00	
Worcester Mechanics Savings Bank, dividends	115.00	
U.S. Savings Series "G" Bonds, interest	37.50	
Income on Law Society Scholarship Fund	141.30	
Contributions for Law Society Scholarship Fund	819.48	
Sale of Massachusetts Law Quarterly	24.64	
Massachusetts Law Quarterly Advertising	1,573.00	
Cenedella Investigation, refund	1,500.00	
Total Miscellaneous Receipts		
Reserve for Employee Withholding Taxes		143.22
TOTAL		50,236.21

DISBURSEMENTS

President's Expense 1/1/53-9/16/53	719.29	
President's Expense 9/16/53-12/31/53	77.06	
Secretary's Expense	500.00	
Treasurers' Expense	77.50	
Massachusetts Law Quarterly Expense	8,444.71	
Mid-Winter Meeting Expense	748.17	
Law Institute Expense	1,038.02	
Executive Committee Expense	1,083.41	
Grievance Committee Expense	62.35	
Membership Committee Expense	795.10	
General Expense	900.78	
Lummus Dinner Expense	2,206.49	
American Bar Association Meeting Expense	2,107.07	
Junior Bar Conference Expense	303.10	
Central Office Expense	9,198.83	
New Quarters, renovations and furnishings	3,292.02	
District Court Reorganization Bill	958.70	
Total Disbursements		32,511.25
Balance on Hand December 31, 1953		17,724.96
Distribution of Balance on Hand:		
Worcester County Institution for Savings		4,000.00
Worcester Mechanics Savings Bank		4,000.00
George R. Nutter Fund, 2 Series "G" U.S. Savings Bonds		1,500.00
Law Society Scholarship Fund:		
Amount of Principal Invested	4,512.40	
Balance of Principal in State Street Trust Company checking account	1,220.62	
Income Received on Investment in State Street Trust Company checking account	437.35	
Total Law Society Scholarship Fund		6,170.37
State Street Trust Company checking account		2,054.59
Total		17,724.96

We the undersigned, appointed under date of December 31, 1953, by Robert W. Bodfish, President of the Massachusetts Bar Association, to audit the report of the Treasurer of the Massachusetts Bar Association for the year 1953, report as follows:

"We have examined the books and accounts of the Treasurer and certify that they are correct."

February 3, 1954

HAROLD HORVITZ

CHARLES S. BOLSTER

E. L. GRIMES PRINTING CO., BOSTON, MASS.